No. 76-1700

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

PEOPLE OF THE STATE OF ILLINOIS, *et al.*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	
I. THE NEED FOR THE I.C.C. TO MAKE FINDINGS AS TO THE IMPACT OF THE ABANDONMENT OF ONE LINE SEGMENT UPON THE VIABILITY OF OTHER SEGMENTS PROPOSED FOR ABANDONMENT BY THE SAME RAILROAD IS AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE PROMPTLY AND DEFINITIVELY RESOLVED AT THIS TIME	4
A. A Large Number of Line Abandonments Are Being Proposed by the Railroads	4
B. The Validity of the "Segmentation" Approach to Railroad Abandonments Should Be Decided Now By This Court	8
II. THE COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT'S STANDARDS FOR REQUIRING AGENCY CONSIDERATION OF INTERRELATED PROCEEDINGS	11

		Page
A.	The "Northern" and "Middle" Segments . .	13
	1. Time of Filing	14
	2. Traffic Data	13
B.	The "Northern" and "Southern" Segments . .	16
CONCLUSION		18
Appendix A	– Opinion and Order of the U.S. Court of Appeals	1a
Appendix B	– Judgment of the U.S. Court of Appeals . .	11a
Appendix C	– Order denying rehearing of the U.S. Court of Appeals	12a
Appendix D	– Order granting stay of mandate of the U.S. Court of Appeals	13a
Appendix E	– I.C.C. Report and Order recommended by the Administrative Law Judge in F.D. No. 26745, The Baltimore and Ohio Railroad Company Abandonment Between Coal Shaft and Beardstown in Sangamon and Cass Counties, Ill. (January 31, 1973) . .	14a
Appendix F	– I.C.C. Order Denying Consolidation of F.D. No. 26745, F.D. No. 26965, and Docket No. AB-19 (Sub-No. 27) (June 17, 1975) . . .	33a
Appendix G	– I.C.C. Decision, Certificate & Order in F.D. No. 26745 – Beardstown/Coal Shaft (November 3, 1975)	34a
Appendix H	– I.C.C. Order denying reconsideration and consolidation and authorizing abandonment in F.D. No. 26745 (May 18, 1976)	37a

		Page
Appendix I	– I.C.C. report and order in F.D. No. 27506 and F.D. No. 26965, involving Flora-Shawneetown line. (February 17, 1977). .	49a
Appendix J	– Statutes, Portions of Section 1 of the Interstate Commerce Act	78a

TABLE OF CITATIONS

Cases:

Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327 (1945) 13

American Trucking Assns. v. U.S., 326 U.S. 77 (1945) 11-13, 16

B. & O. R. Co. v. United States, 386 U.S. 372 (1967) 13

City of Chicago v. United States, 396 U.S. 162 (1969) 8

City of Chicago v. United States, 314 F. Supp. 886 (N.D. Ill. 1970), reversed 400 U.S. 987 (1971) 9

I.C.C. v. Parker, 326 U.S. 60 (1945) 12

McCandles v. Furlaud, 296 U.S. 140 (1935) 11

Mechling Barge Lines v. U.S., 376 U.S. 375 (1964) 12

Page

New Jersey v. New York, S. & W. R. Co.,
372 U.S. 1 (1963) 8

N.L.R.B. v. Metropolitan Life Ins. Co.,
380 U.S. 438 (1965) 16

Passenger Corp. v. Passengers Assn.,
414 U.S. 453 (1974) 8

Prairie Trunk Railway-Acquisition and Operation,
348 I.C.C. 832 (1977) 17

S.E.C. v. Chenery Corp.,
332 U.S. 194 (1947) 16

Southern R. Co. v. North Carolina,
376 U.S. 93 (1964) 8

Upshaw v. United States, 335 U.S. 410 (1948)
335 U.S. 410 (1948) 11

United States v. Chicago, 400 U.S.
400 U.S. 8 (1970) 9

Legislative

S. Rept. No. 94-499, 94th Cong., 1st Sess. (1975) 7

Articles

Aug, Stephen M., Private Meeting at I.C.C. Followed by C&O Filing, Washington Star-News (March 19, 1973) 14

Traffic World, Vol. 170, No. 8 (May 23, 1977) 7

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PEOPLE OF THE STATE OF ILLINOIS, *et al.*,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, People of the State of Illinois (William J. Scott, Attorney General), City of Beardstown, Cass County Service Company, and United Transportation Union (John W. McGinness and George B. Lee), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on March 23, 1977.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals, not yet reported, is printed as Appendix A hereto (App. 1a-10a).

The orders of the Interstate Commerce Commission in Finance Docket No. 26745, *The Baltimore and Ohio Railroad Company Abandonment Between Coal Shaft and Beardstown, Illinois* (Appendices E through H, App. 14a-48a) are unreported.

JURISDICTION

The judgment of the U.S. Court of Appeals was entered March 23, 1977, and is printed as Appendix B hereto. (App. 11a). The order denying rehearing was entered April 22, 1977, and is printed as Appendix C hereto. (App. 12a). On May 2, 1977, that court stayed the issuance of its mandate to and including May 31, 1977.[1] This Court's jurisdiction is conferred by 28 U.S.C. 1254(1).

QUESTION PRESENTED

Where a railroad proposes to abandon a 228-mile line of railroad by means of three separate applications to the I.C.C. covering three segments, does the I.C.C. err in authorizing the abandonment of one segment ("northern"), without evidence and findings concerning the impact of the abandonment of that segment upon the continued viability of the remaining "middle" and "southern" segments?

STATUTES INVOLVED

The statutes involved are the railroad line abandonment provisions of section 1 of the Interstate Commerce Act, 49 U.S.C. 1 (18)-(20), as amended February 5, 1976 by enactment of sections 802 and 809(c) of P.L. 94-210, Railroad

[1] The stay order is printed as Appendix D hereto. (App. 13a).

Revitalization and Regulatory Reform Act of 1976, and October 19, 1976 by section 218 of P.L. 94-555, Rail Transportation Improvement Act, 49 U.S.C. 1a. These statutory provisions are set forth in Appendix J. (App. 78a).

STATEMENT

This is an action to review orders of the Interstate Commerce Commission ("I.C.C.") authorizing The Baltimore and Ohio Railroad Company ("B&O") to abandon a 43.7-mile segment of railroad between Beardstown and Coal Shaft, Ill.[2] B&O operates a 228-mile line extending between Beardstown, Ill., on the Illinois River, to Shawneetown, Ill., on the Ohio River. (App. 15a). B&O filed three applications for abandonment with the I.C.C. covering separate portions of this 228-mile line, two in 1971, and the third in 1975.[3] This court action involves the so-called "northern" segment. The other two segments – still undergoing I.C.C. consideration – are the "middle" segment between Sangamon Jct.[4] and Flora, Ill.,[5] and the "southern" segment between Flora and Shawneetown, Ill.[6]

[2] Coal Shaft is situated on the western outskirts of Springfield. (App. 2a).

[3] The 1975 application was "announced" by B&O in 1972 during the hearing for the southern segment, but then retracted. (App. 2a, 17a). The application thereafter was executed by B&O on November 14, 1974, but withheld from the I.C.C. until March 18, 1975.

[4] Sangamon Jct. is located just east of Springfield. (App. 2a).

[5] The "middle" segment is pending at the I.C.C. in Docket No. AB-19 (Sub-No. 27).

[6] Finance Docket No. 26965. The Administrative Law Judge recommended denial of the abandonment in 1973. (App. 2a, 34a, 51a). However, the I.C.C. on February 17, 1977 allowed B&O to discontinue operation of the southern segment, and sale of the segment to a "short-line" operator. (App. 49a). Judicial review of this decision was instituted March 22, 1977, No. 77-1333 (7th Cir.). *People of the State of Illinois v. U.S.A. & I.C.C.* Petitions for reconsideration are also pending with the I.C.C.

Petitioners challenge the I.C.C. order authorizing B&O to discontinue operation of its "northern" segment, without the rendition of findings concerning the impact of the proposed termination of service over the northern segment upon the continued viability of operations on the other two segments, particularly the "middle" segment between Sangamon Jct. and Flora, Ill.[7] In short, the I.C.C. improperly considered the northern segment application in a vacuum, without regard to the entire line.

The I.C.C. on June 17, 1975 declined to consolidate the three abandonment applications, noting that the Administrative Law Judge's recommended reports in the northern and southern segments were both served February 14, 1973, which granted the northern segment application and denied the southern segment applications, and that concurrent handling of all three applications is not warranted and would unnecessarily result in an undue delay of a final decision in each proceeding. (App. 33a-34a).

The I.C.C. on November 3, 1975 authorized abandonment of the northern segment (App. 34a-36a). Petitions for reconsideration, and for consolidation, were denied May 18, 1976, the I.C.C.'s order taking account of the intervening enactment of amendments to the abandonment provisions of the Interstate Commerce Act on February 5, 1976. (App. 37a-48a).

The Court of Appeals sustained the action of the I.C.C. in not considering the interrelationships between the northern and middle segments, primarily upon the "important fact" that B&O did not file its application to abandon the

[7] Operations on the "northern" segment were marginally profitable. The railroad realized a net profit in 1969 and 1970 of $16,876 and $27,883 respectively, and a loss of $13,125 in 1971. (App. 24a)

middle segment until after the initial decision had been made on the northern segment. (App. 6a). The court further reasoned that the ALJ had before him evidence that "most" of the northern traffic west east to Indianapolis, rather than over the middle segment, and that the northern segment traffic was light to begin with. (App. 6a-7a).

The Court of Appeals held that the I.C.C. had met the requirements established by this Court in *American Trucking Assns. v. U.S.*, 326 U.S. 77 (1945), for considering the possible interrelationships between the "northern" and "middle segments", and between the "northern" and "southern" segments of B&O's 228-mile line between Beardstown and Shawneetown, Ill.

The court stayed its mandate pending application for writ of certiorari. Earlier, the court had enjoined operation of the I.C.C. orders pending judicial review.

REASONS FOR GRANTING THE WRIT

I. THE NEED FOR THE I.C.C. TO MAKE FINDINGS AS TO THE IMPACT OF THE ABANDONMENT OF ONE LINE SEGMENT UPON THE VIABILITY OF OTHER SEGMENTS PROPOSED FOR ABANDONMENT BY THE SAME RAILROAD IS AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE PROMPTLY AND DEFINITIVELY RESOLVED AT THIS TIME.

A. A Large Number of Line Abandonments are Being Proposed by the Railroads.

Congress on February 5, 1976, revised the statutory provisions governing the abandonment of lines by railroads. Section 1(18) of the Interstate Commerce Act was amended so as to be confined to extensions of

line, and sections 1(19)-(22) were repealed.[8] A new section 1a was enacted to govern abandonments.[9] Certain minor revisions to section 1a were added on October 19, 1976.[10]

The changes in the abandonment provisions are basically procedural in nature, with the exeption of a new program of federal financial assistance for certain branch lines after the I.C.C. has determined that public convenience and necessity permit the abandonment of a line.[11] No change was made in the substantive "public convenience and necessity" standard. The revised procedural requirements – principally the time frame within which the I.C.C. must decide the abandonment applications and the notice which must be afforded the public – were occasioned by an anticipated flood of abandonment applications. The Senate committee report states (S. Rept. No. 94-499, p. 43).

> "A 1971 report by the Department of Transportation concluded that approximately 21,000 miles of railroad through the Nation could be candidates for abandonment. The DOT report for the Northeast/Midwest Region . . . identified 15,575 miles of both profitable excess". The Association of American Railroads estimates that 22,500 miles of railroad throughout the Nation are uneconomic, costing the railroad industry nearly $144 million annually."

8 Section 801 of P.L. 94-210. 90 Stat. 125-27

9 Section 802 and 809(c) of P.L. 94-210, 90 Stat. 127-30, 146.

10 Section 218 of P.L. 94-555. 90 Stat. 2628.

11 Section 1a(6), (7), (10). (App. 78a), See also section 803 of P.L. 94-210. 90 Stat. 130-33.

The public disclosures by the railroads in April and May, 1977 as to their lines "potentially subject to abandonment", under the new procedural regulations, [12] indicate that 10.9% of the total rail mileage in Illinois (without considering the lines of the Consolidated Rail Corporation) are subject to abandonment. The impact upon other Midwest states is even more severe:[13]

STATE IMPACTS

State	Miles	Total Miles (1974)	Percent Aband.
Iowa	1,437	7,587	18.9
Minn.	1,133	7,366	15.4
S.D.	1,520	3,351	45.4
Mo.	736	6,062	12.1
Ill.	1,149	10,573	10.9
Mich.	1,136	5,963	19.1
Wis.	1,210	5,808	20.8

It is clear that the Nation is about to witness a major movement by the railroad industry toward a substantial reduction in railroad mileage. The proposed discontinuances may parallel the scope and intensity of the

12 49 U.S.C. [illegible]). 49 CFR 1121.20. See: 41 Fed. Reg. 45821-22, 42 Fed. Reg. 25327.

13 See: Traffic World, Vol. 170, No. 8, p. 15 (May 23, 1977).

passenger train terminations of the 1960's. *New Jersey v. New York, S. & W. R. Co.*, 372 U.S. 1 (1963); *Southern R. Co. v. North Carolina*, 376 U.S. 93 (1964); *City of Chicago v. United States*, 396 U.S. 162 (1969); *United States v. Chicago*, 400 U.S. 8 (1970); *Passenger Corp. v. Passengers Assn.*, 414 U.S. 453 (1974).

B. The Validity of the "Segmentation" Approach to Railroad Abandonments Should Be Decided now by this Court.

The new tactic being advanced by B&O and other major railroads in seeking to abandon a line is to divide the line into segments for the purpose of filing abandonment applications with the I.C.C. Even though the same freight traffic may move over several segments, the I.C.C. determines the public convenience and necessity of one segment without reference to the other segments also proposed for abandonment. Thus, in this case, the I.C.C. refused to consolidate the three segments of B&O's 228-mile line between Beardstown and Shawneetown. This failure to consolidate was followed by an absence of traffice data and findings as to the effect which abandonment of one segment might have on the continued operation of the other segments. In another example, the Illinois Central Gulf Railroad Company has filed three applications to abandon a continuous 50.31-mile line between Sherman and Grove, Ill. (part of its Peoria-Springfield Line). On March 22, 1977 the I.C.C. authorized the abandonment of the "southern" 10.47-mile segment (AB-43 (Sub-No. 13)),[14]

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[14] Illinois Central Gulf Railroad Company – Abandonment Between Croft and Sherman in Sangamon and Menard Counties, Illinois.

while the "middle" (AB-43 (Sub-No. 18))[15] and "northern" (AB-43 (Sub-No. 19))[16] segments were undergoing hearing in separate proceedings.

The "segment"approach worked well for the railroads in achieving the rapid elimination of major passenger trains in the 1960's. When two railroads joined in operating the overnight "Georgian" through train between Chicago, Ill. and Atlanta, Ga., the railroad transporting the train between Chicago, Ill. and Evansville, Ind. was permitted to discontinue its "train" without reference to the Evansville, Ind.–Atlanta, Ga. "train" operated by its connecting railroad, and without regard to the viability of the connecting "Hummingbird" train operating between Cincinnati, Ohio and New Orleans, La. via Nashville, Tenn. The Court approved this methodology on the theory that separate railroads were involved, each with its own "train", as a matter of agency construction of the term "train". *United States v. Chicago*, 400 U.S. 8 (1970). In a somewhat similar fashion, the famed "California Zephyr" passenger train operating between Chicago, Ill. and Oakland, Calif., was destroyed when one of the three connecting railroads discontinued its "train"segment. *City of Chicago v. United States*, 314 F. Supp. 886 (N.D. Ill. 1970), reversed 400 U.S. 987 (1971).

However, there is a major difference between segementation of a passenger train among several carriers, on the one

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[15] Illinois Central Gulf Railroad Company Abandonment Between San Jose and Croft in Menard and Logan Counties, Illinois.

[16] Illinois Central Gulf Railroad Company Abandonment Between Grove and San Jose, in Mason and Tazewell Counties, Illinois.

hand, and extending the concept to the filing by a single carrier of several applications to cover the abandonment of its freight line, on the other hand. In passenger proceedings, each railroad is considered to operate one "train", whereas in freight abandonment cases one railroad now attempts to subdivide its own freight operation into several segments.[17]

It is important for this Court to rule promptly on the "segmentation" procedure being advanced for line abandonments, in order to avoid serious damage to the economy of the affected states served by railroads employing this tactic.

The "segmentation" device should not be extended from passenger train discontinuance by a single railroad which is a party to joint-railroad movement, to the fragmentation of a single railroad's freight operations into multiple segments on a given line of railroad.

This issue is of pressing importance. Congress by its recent amendments recognized the importance of having a railroad announce its intentions to possibly seek abandonment of a line well in advance of any actual filing of an application. See footnote 12, *supra*. But this procedural change in the statutory provisions will be undercut and frustrated unless the I.C.C. is placed under the obligation to consider and to make findings concerning the impact of a proposed abandonment upon other segments of the involved line which are contemplated for abandonment.

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[17] Train crews serve B&O's "northern" segment three days per week, and on the alternate days serve the "Middle" segment, exchanging the cars with the Flora train at Pana. (App. 20a)

The validity of the "segmentation" technique, carried forward by the railroads from recent experience with passenger train discontinuance, warrants a searching review by this Court.

II. THE COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT'S STANDARDS FOR REQUIRING AGENCY CONSIDERATION OF INTERRELATED PROCEEDINGS.

While normally the erroneous nature of the decision below is not in itself sufficient to warrant plenary consideration, it is sometimes appropriate and necessary to grant certiorari to correct serious error when the court below has misapplied, misconstrued, or misconceived an applicable Supreme Court opinion. *McCandles v. Furlaud*, 296 U.S. 140 (1935); *Upshaw v. United States*, 335 U.S. 410 (1948).

The principal decision relied upon by the Court and the parties, as requiring evidence of traffic flows between B&O's "northern" and "middle" segments of the 228-mile line, is *American Trucking Assns. v. U.S.*, 326 U.S. 77 (1945). (App. 4a-7a). In that case a major railroad filed a series of applications to extend its motor carrier authority. The I.C.C. declined to consolidate the applications, and did not receive evidence of the flow of traffic by truck from points covered in one application to points covered by other applications, and did not receive evidence as to the effect on all railroad routes for which application were pending.

This Court stated in remanding, 326 U.S. at 85:

> "We think that it is sufficient to say that the joint boards and the Commission should have admitted evidence of the flow of traffic by truck from points covered in one application to points covered by other applications and evidence of the effect of the motor traffic, developed or prospective on all Seaboard routes for which applications are pending or already granted, on the over-the-road motor carriers. . . .The applicant will of course be required to furnish needed statistical evidence which is reasonably available to it and will have opportunity to submit evidence upon its own part."

The court strongly suggested consolidation upon remand. 326 U.S. at 83.[18]

The *A.T.A.* case is significant also to this abandonment proceeding because the "public convenience and necessity"standard for motor carrier licenses was taken from the "public convenience and necessity" standard for line abandonments. *I.C.C. v. Parker*, 326 U.S. 60, 65 (1945).

The Court of Appeals thought that the 14 separate applications in the *A.T.A.* case made a stronger case for consideration of segment interrelationships than the three segments in B&O's abandonment proceedings but,

[18] The court criticized the I.C.C.'s fragmentation of a rate case in *Mechling Barge Lines v. U.S.*, 376 U.S. 375, 383 (1964).

nevertheless, held that the appropriate consideration of possible interrelationships was satisfied here. (App. 5a). The Court erred in so construing and applying the *A.T.A.* case.

A. The "Northern" and "Middle" Segments.

1. Time of Filing Application

The principal reason advanced by the Court of Appeals for upholding the I.C.C.'s failure to consider and render findings on the interrelationships between the "northern" and "middle" segments, is that no application for abandonment of the "middle" segment had been made at the time of hearing or initial decision on the northern segment. (App. 6a). This justification was not made by the I.C.C. (App. 33a-34a). The *A.T.A.* rule for requiring traffic flow data does not depend upon a "cut-off" date for comparative applications as under the *Ashbacker* doctrine, promulgated by the Civil Aeronautics Board for rival airline routes,[19] and by the Federal Commission for broadcast applications.[20] See: *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327 (1945). Rather, in view of the finding of the initial decision that a 228-mile branch line is involved (App. 16a), the failure of the I.C.C. to render findings concerning all segments thereof means that the ultimate conclusion – that abandonment of the "northern" segment is permitted by the public convenience and necessity – is without supports and falls under the prior 228-mile finding, Cf. *B. & O. R. Co. v. United States*, 386 U.S. 372, 389 (1967).

[19] See: 14 CFR 302.12(b).

[20] See: 47 CFR 1.227.

Moreover, the time for filing an application to abandon the "middle" segment was in the control of B&O. The carrier originally "announced" the forthcoming application in 1972, but then retracted. (App. 16a-17a) The application was then executed November 14, 1974, but not physically filed until four months later on March 18, 1975.[21]

2. Traffic Data

The initial decision in the instant "northern" segment case found that a 228-mile branch line is involved (App. 16a). The initial decision noted that petitioners requested data for the "middle segment" (App. 17a):

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[21] The Court of Appeals in a footnote deals with the contention that B&O had advised the I.C.C. in 1971 that it intended to seek abandonment of the middle segment, and that the I.C.C. knowingly stood by. (App. 6a). The information was first suggested generally in an article by Aug, Stephen M., *Private Meeting at ICC Followed by C&O Filing*, Washington Star-News, March 19, 1973. Thereafter, counsel for petitioners personally viewed the railroad's papers at the I.C.C. which showed an intention to abandon a portion of the middle segment. A petition for official notice was filed shortly thereafter with the I.C.C. B&O never denied the fact. Indeed, B&O in its reply in the I.C.C. proceedings, dated January 5, 1976 (Doc. No. 159), at p. 3, acknowledged the petition for official notice, made no objection thereto, and did not dispute the facts stated therein. (Doc. No. 101). However, in the Court of Appeals, the Government contended that "confirming papers" could not now be located. Counsel for petitioners furnished the Court of Appeals with an affidavit and a copy of detailed notes taken in 1973 at the offices of the I.C.C. Admission of the affidavit was unopposed. Such is appropriate additional evidence. 28 U.S.C. 2347(c). It is a widely-known fact that C&O-B&O inaugurated a large-scale abandonment program in 1971, with delayed filings of some applications.

> "Protestants also have alleged error on the part of the judge in refusing to require the applicant . . . also to furnish data pertaining to the operation on the middle segment of the line, particularly as such operations may be adversely affected by the abandonment of the northern and southern portions as proposed."

The Administrative Law Judge suggested that B&O furnish the data, but did not require it, on the ground that it was not necessary or relevant, and that the "predominance" of the Beardstown traffic moved to or from the Indianapolis Division. (App. 18a-19a):

> "It was indicated to the applicant that further data with respect to the cars operated over the Beardstown Branch may be useful showing those which at Sangamon Junction moved to or from the Indianapolis Division and those which moved over the Flora Branch. Counsel for applicant agreed that if the presiding officer so required the data would be supplied, but it was not considered necessary or relevant. The record does show that the predominance of the Beardstown Branch traffic moved to or from the Indianapolis Division. In the circumstances the applicant was not required to provide the specific data with respect to the division of the cars at Sangamon Junction. It is concluded that such information is not essential to a decision in this proceeding."

The finding that the amount of traffic flowing between the "northern" and "middle" segments is not necessary or relevant is directly contrary to the *A.T.A.* decision of this Court. Moreover, the fact that the "predominance" of the Beardstown traffic – which we assume as 1 car more than 50 percent[22] – does not eliminate the need for traffic and revenue figures.

The Court of Appeals stated it could not say the ALJ's report inadequately considered appropriate interrelationships. (App. 7a) The Court of Appeals errs because the ALJ expressly declined to consider the data necessary or relevant, and thus did not consider the interrelationships. The Court of Appeals must rely upon the justification advanced by the agency. *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *N.L.R.B. v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 443-44 (1965).

The Court of Appeals has misconstrued and misapplied the *A.T.A.* standards to the relationship between the "northern" and "middle segments".

B. The "Northern" and "Southern" Segments.

The I.C.C. had evidence in the "northern" case as to the traffic movement between "northern" and "southern" segments. The initial decision for both segments were issued simultaneously in early 1973. A principal reason given by the I.C.C. for failure to consolidate or to give concurrent handling and disposition with the "southern" segment, also

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[22] The "predominance" expression was used by B&O's witness to describe Beardstown "bridge" traffic, and may not refer to all traffic. (Tr. 76-78).

echoed by the Court of Appeals, is that the initial decision denied the "southern" segment application (App. 2a, 6a, 17a, 34a).

However, the I.C.C. subsequently overruled the initial decision for the "southern" segment, and entered an order allowing B&O to discontinue operations over the "southern" segment by way of sale to a short-line operator. *Prairie Trunk Railway-Acquisition and Operation*, 348 I.C.C. 832 (Feb. 17, 1977). (App. 49a-77a). The Court of Appeals was aware of the *Prairie Trunk* decision.

The failure to follow the *A.T.A.* decision concerning the interrelationships between the "northern" and "southern" segments is not excused by the prior favorable result for the "southern" segment. The initial decision's final denial was not followed by the agency.[23]

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[23] When the I.C.C. on June 17, 1975 denied consolidation of the proceedings involving the three segments, giving as a reason the initial decision denying abandonment in the "southern" case (App. 33a-34a), it did so in the face of another initial decision, served June 10, 1975, approving B&O's disposition of the line. (App. 52a).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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May 31, 1977

APPENDIX A
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

ARGUED: December 9, 1976
March 23, 1977.

Before

Hon. *WILBUR F. PELL, JR., Circuit Judge*

Hon. *WILLIAM J. BAUER, Circuit Judge*

Hon. *WILLIAM J. CAMPBELL, Senior District Judge*•

PEOPLE OF THE STATE OF ILLINOIS, CITY OF BEARDSTOWN, CASS COUNTY SERVICE COMPANY, JOHN W. McGINNESS, and J. THOMAS McNEAL,
Petitioners,

No. 76-1561 vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for Review of Orders of the Interstate Commerce Commission.

ORDER

This is a petition to review, set aside, and remand orders of the respondent Interstate Commerce Commission (ICC) authorizing the Baltimore and Ohio Railroad Company

• Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

(B&O), an intervening respondent here, to abandon a 43.7-mile railroad line between Beardstown and Coal Shaft, both in Illinois. Although only the orders pertinent to this line segment are directly attacked here, the issues in the case involve two other line segments.

The Beardstown-Coal Shaft line (northern segment) proceeds southeast from the former to the latter point, the latter being on the western outskirts of Springfield. Approximately five miles of Chicago and Illinois Midland track and joint Illinois Central/B&O track proceed through Springfield, connecting Coal Shaft and Sangamon Junction. At Sangamon Junction, the B&O line divides, one line running east to Indianapolis, the other running southeast from Sangamon Junction to Flora (middle segment) and on from Flora to Shawneetown (southern segment). B&O's abandonment application for the northern segment was filed on August 13, 1971. A similar application for the southern segment was filed on December 22, 1971. Both applications were assigned to the same Administrative Law Judge (ALJ), who scheduled separate public hearings for each application. During the southern segment hearings, on June 19, 1972, B&O counsel stated that B&O intended to make application to abandon the middle segment as well; this representation was later retracted, B&O noting that a decision on the middle segment was still under management review. Several of the petitioners moved for consolidation of the pending proceedings.

In the ALJ's January 31, 1973, separate reports on the northern and southern segments, consolidation was denied, and authorization to abandon was recommended for the northern segment but not for the southern segment. Final action on the reports was held in abeyance by the ICC, which awaited an appellate decision in a pending Second Circuit case, the issues of which were applicable to these

proceedings. On March 18, 1975, B&O applied for abandonment authority on the middle segment, and several petitioners made a new motion for consolidation and the reopening of the northern and southern segment proceedings. This motion was denied on June 17, 1975. On November 3, 1975, ICC Review Board No. 5 affirmed and adopted the northern segment report of the ALJ. Requested reconsideration was denied by Division 3 of the ICC, acting as an Appellate Division, and this petition for review followed.

We begin our consideration by noting that petitioners do not directly attack the substantive conclusion of the ICC that the public convenience and necessity permit abandonment of the northern segment. Instead, they argue that the ICC improperly considered the northern segment abandonment application in a vacuum, without proper regard for interrelationships between all three segments which they characterize as part of one 228-mile line. This argument takes three forms.

First, petitioners assert that the ICC should have consolidated the northern and southern segment proceedings in response to their 1972 motion, and should have reopened both of these for consolidation with the middle segment proceeding in response to their 1975 motion. We disagree. The choice of whether or not to consolidate related proceedings is "a matter for administrative discretion," *American Trucking Associations, Inc. v. United States,* 326 U.S. 77, 83 (1945), and it is not for this court to dictate to the ICC the procedures it should follow in discharging its duties, *See Federal Communications Commission v. Pottsville Broadcasting Co.,* 309 U.S. 134, 143 (1940). As the District of Columbia Circuit recently recognized:

> No principle of administrative law is more firmly established than that of agency control

> of its own calendar. Practical problems of calendar administration confront an agency whenever related applications are pending at the same time. Consolidation * * * and similar questions are housekeeping details addressed to the discretion of the agency and, due process or statutory considerations aside, are no concern of the courts.

Association of Massachusetts Consumers, Incorporated v. United States Securities and Exchange Commission, 516 F.2d 711, 714 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976), quoting *City of San Antonio v. Civil Aeronautics Board*, 374 F.2d 326, 329 (D.C. Cir. 1967). *See also* 1 *K. Davis, Administrative Law Treatres* §8.12, at 572-73 (1958). There are no statutory or due process considerations present here, and no suggestion is made that the comparative hearing exception of *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327 (1945), and its progeny, has any application to this case. We perceive no abuse of the ICC's substantial discretion in this regard; both the ALJ's decision and the Commission's 1975 order denying consolidation after B & O sought to abandon the middle segment set out sound reasons for denying consolidation, and it is not our function to second-guess these determinations.

Petitioners' second argument, which relies heavily on *American Trucking Associations, Inc. v. United States, supra*, is that even if the ICC was not obliged to consolidate the segment proceedings, it was obliged, in determining the public convenience and necessity, to consider the effects of abandoning each segment on the other segments. In *American Trucking*, a rail carrier filed fourteen applications for authorities

to conduct trucking services auxiliary to its rail services, parallel to the railroad's main lines and covering most of the distance between Richmond, Virginia and Jacksonville, Florida. Numerous entirely independent hearings were conducted on a segmented basis, and evidence of the effect of the proposed service on non-rail carriers in the areas covered was excluded in each proceeding. The Court did require that evidence be admitted pertinent to the effect on motor carriers of all the applicant's routes, and stated that evidence of truck flow from points covered by one application to points covered by one application to points covered by another could not be excluded. 326 U.S. at 85. We think that the requirement of assessing impact on non-rail carriers which did not limit their operations to the neat little geographic packages represented in the fourteen applications made a stronger case for consideration of segment interrelationships in *American Trucking* than is present in this abandonment proceeding. But assuming *arguendo*, that appropriate consideration of possible interrelationships was required here, we believe any such requirement was met.

With reference to the only two abandonment applications pending at the time, covering the northern and southern segments, the same ALJ heard both proceedings and was thoroughly familiar with the comparative considerations underlying both. He concluded that "[e]ach of the proceedings is clearly identifiable and separate," and that "the shippers and their interest are different." We have reviewed the record, and we surely cannot say that these findings lack substantial support in the evidence. In this regard, we think it is significant that the record shows that the preponderance of northern segment traffic moved east from Sangamon Junction to Indianapolis and did not travel on either the middle or southern segments, and that of more than 2500

cars moving over either the northern or southern segments in 1971, only 14 moved on both segments. We also note that the ALJ found the conditions pertaining to the northern and southern segments to be so different that he recommended granting the former and denying the latter application for abandonment.

With respect to interrelationships between the northern and middle segments, we repeat the important fact that no application for abandonment of the middle segment had been made at the time of hearing or initial decision on the northern segment.[1] We do not believe it was incumbent on the ALJ to forecast B&O's intentions regarding the middle segment in 1972 and to design his hearing schedule and evidentiary rulings on the basis of the then unfounded assumption that abandonment was in the works. *Cf. American Trucking, supra,* 326 U.S. at 83. Nor do we think there was any requirement that the ICC, in determining the public convenience and necessity, re-open this proceeding more than two years after the record was closed and recommendations were made because B&O did ultimately file an abandonment application on the middle segment in 1975. In any case, the ALJ had before him evidence that most of the northern segment traffic travel-

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[1] Petitioners place substantial emphasis on their claim that the ICC had been informed in writing in 1971 that B&O intended to make such an application. However, other than a petition filed with the ICC by two of the petitioners here which averred this to be a fact, there is nothing in the record to support such a conclusion, and the joint brief of the United States and the ICC represents that a search of ICC files failed to produce any such writings. Accordingly, we can give very little, if any, significance to the petitioners' suggestions that B&O communicated a fixed intention to the ICC in 1971 but withheld application to avoid consolidated consideration and that the ICC knowingly stood by and watched this happen.

led on east to Indianapolis rather than southeast over the middle and/or southern segments. Because the northern segment traffic was light to begin with, we surely cannot say that the ALJ's later-adopted report inadequately considered appropriate interrelationships. Petitioners contention that they were improperly denied access to more specific breakdowns on traffic data relating the northern and middle segments must be rejected for similar reasons.

Petitioners' third and final argument along these lines is directed at the adequacy of the ICC's environmental Threshold Assessment Survey (TAS) and conclusions therefrom that the northern segment abandonment was not a major federal action significantly affecting the quality of the environment within the meaning of the National Environmental Policy Act, 42 U.S.C. § s 4321 *et seq.*, and that a full environmental impact statement (EIS) was not required. Petitioners concede that the rule in this circuit is that such negative threshold determinations by a federal agency must stand unless they are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law or without observance of procedure required by law." *First National Bank of Chicago, v. Richardson,* 484 F.2d 1369, 1381 (7th Cir. 1973); *Nucleus of Chicago Homeowners Association v. Lynn,* 524 F.2d 225, 229-30 (7th Cir. 1975), *cert. denied,* 424 U.S. 967. Petitioners' argument here is that the scope of evaluation in a decision not to file in EIS, like the scope of an EIS when one is filed, must be at least as broad as the federal action being undertaken, *See Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedures (SCRAP),* 422 U.S. 289, 322 (1975); and *Kleepe v. Sierra Club,* ____ U.S. ___, 44 U.S.L.W. 5104, 5109 (June 28, 1976), and that the TAS prepared here was fatally deficient because it considered only the northern segment abandonment. We disagree. As the Supreme Court recently made clear in *Kleppe, supra,* ____U.S. ___, 44

U.S.L.W. at 5110, the refusal to prepare a comprehensive evaluation may be set aside only if arbitrary, and we cannot say the ICC's threshold determination here was arbitrarily limited in scope.

At the time the TAS was first issued (January 30, 1975), only the northern and southern segment abandoment applications had been filed. Emphasizing the 111-mile geographic separation between these segments and the factors which had led the ALJ to deny consolidation, the TAS expressed the ICC Environmental Staff's view that the segments could properly be considered separately. This determination was not arbitrary; nor was a consolidated environmental review required by what was then the mere possibility of a later application to abandon the middle segment. *See Kleppe, supra,* ___U.S. at ___, 44 U.S.L.W. at 5108; *compare Swain v. Brinegar,* 542 F.2d 364, 369 (7th Cir. 1976) (en banc); *and see Chicago Homeowners, supra,* 524 F.2d at 230.

After B&O filed its middle segment application, the ICC staff issued an addendum to the TAS. The addendum indicated the staff's previous awareness of a possible middle segment filing, but concluded that the middle segment was "functionally and environmentally dissimilar" to the northern segment and that any environmental nexus was "too remote to be a factor in this TAS." The addendum set out nonarbitrary considerations supporting these conclusions and properly distinguished between segment interrelationships which pertained only to the merits of the normal public convenience and necessity determination and those which pertained to environmental factors. At least in the circumstances of this case, we perceive no abuse of discretion in this appraoch. We also think it is significant in this regard that a comprehensive environmental evaluation of all three segment applications would

have entailed a substantial and unnecessary delay in the resolution of the then nearly completed northern segment proceeding.

One other point requires brief attention, although petitioners do not press it. In the joint brief of the United States and the ICC, respondents conceded that the technically proper procedure would have been to prepare the TAS before oral hearing in this proceeding, so that comments if necessary as part of the recommended Report and Order. Respondents seek to excuse their noncompliance with this procedure here because it was only after the June 1974 decision on appeal in *Harlem Valley Transportation Association v. Stafford,* 500 F.2d 328 (2d Cir. 1974).,[2] that the propriety of such a procedure was made clear to the ICC. In addition, they argue, remand to solve this technical noncompliance problem would serve no useful purpose, because comments on the TAS were received and were valuated and responded to in the TAS addendum, because the environmental concerns of at least one petitioner were briefed to the ALJ and considered in his recommended Report and Order,[3] and because, in short, "the environmental factors have been thoroughly considered

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[2] The decision in *Harlem Valley, supra,* was what the ICC was awaiting when it stayed final determination of this and other proceedings, as mentioned above.

[3] The objection of this petitioner, Cass County Service Company, to allegedly improper "ex parte" contacts between ICC staff and B&O in the preparation of the TAS has been considered and is without substantial merit in the circumstances of this case.

and NEPA procedures have now been fully complied with . . ." We note the Second Circuit's appraisal that "the ICC has been slow in reacting to the directives of NEPA," *Harlem Valley, supra,* 500 F.2d at 331, and we do not defend the ICC's "technical" noncompliance with proper NEPA procedures here. Nonetheless, we take the ICC's concession as to proper procedure to indicate its willingness to comply in present and future proceedings, and we agree that, in the circumstances of this case, no useful purpose other than that of a symbolic slap on the wrist would be achieved by remanding. For the reasons set forth in this order, the petition for review is denied.

PETITION DENIED.

Appendix B

Unpublished Per Curiam Order

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

March 23, 1977

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. WILLIAM J. CAMPBELL, Senior District Judge

No. 76-1561

PEOPLE OF THE STATE OF ILLINOIS, CITY OF BEARDSTOWN, CASS COUNTY SERVICE COMPANY, JOHN W. MC GINNES, and J. THOMAS MC NEAL,
Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents.

Petition for Review of Orders of the Interstate Commerce Commission

This cause came on to be heard on the transcript of the record from the Interstate Commerce Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the petition for review of orders of the Interstate Commerce Commission in this cause be, and the same is hereby, DENIED, in accordance with the order of this Court entered this date.

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* Honorable William J. Campbell, Senior Judge, United States District Court for the Northern District of Illinois, sitting by designation.

Appendix C

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

April 22, 1977

Before

Hon. WILBUR F. PELL, Circuit Judge

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. WILLIAM J. CAMPBELL, Senior District Judge*

PEOPLE OF THE STATE OF ILLINOIS, et al.,
Petitioners,
v.
UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

No. 76-1561

On Petition for Review Of Orders of the Interstate Commerce Comission

On consideration of the petition for rehearing filed in the above-entitled cause by People of the State of Illinois, et al., petitioner, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Honorable William J. Campbell, Senior Judge, United States District Court for the Northern District of Illinois, sitting by designation.

Appendix D

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

May 2, 1977

Before

Hon. WILBUR F. PELL, JR., Circuit Judge

PEOPLE OF THE STATE OF ILLINOIS, CITY OF BEARDSTOWN, CASS COUNTY SERVICE COMPANY, JOHN W. McGINNESS and J. McNEAL,
Petitioners,
v.
UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents,
BALTIMORE AND OHIO RAILROAD COMPANY,
Intervenor.
CAPITAL CITY RAILROAD RELOCATION AUTHORITY,
Intervenor.

No. 76-1561

Petition for Review of an Order of the Interstate Commerce Commission.

On consideration of the "MOTION FOR STAY OF MANDATE PENDING APPLICATION FOR CERTIORARI" filed herein by counsel for the petitioners on April 28, 1977,

IT IS ORDERED that said motion be, and the same is hereby, GRANTED and the mandate of this Court is STAYED up to and including May 31, 1977 pending application to the United States Supreme Court for a petition for writ of certiorari.

APPENDIX E

OH

INTERSTATE COMMERCE COMMISSION

SERVICE DATE:
February 14, 1973

Finance Docket No. 26745

THE BALTIMORE AND OHIO RAILROAD COMPANY
ABANDONMENT BETWEEN COAL SHAFT AND
BEARDSTOWN IN SANGAMON AND
CASS COUNTIES, ILLINOIS

Decided

CERTIFICATE AND ORDER ISSUED PERMITTING ABANDONMENT BY THE BALTIMORE AND OHIO RAILROAD COMPANY OF ITS BEARDSTOWN BRANCH IN SANGAMON AND CASS COUNTIES, ILL. CONDITIONS PRESCRIBED[1].

Richard B. Allen, for applicant.

John R. Chapin, for intervenors in support of applicant.

[1] Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D.C., and served on all other parties in interest, within 30 days from the date of service shown above. Replies thereto may be filed within 20 days after the final date for filing exceptions.

Gordon P. MacDougall, Robert L. Graves, Henry E. Bruno, George Patrick Sheahan, Thomas J. Duggen, George B. Lee, Robert D. Fritz, and *Winston C. Harbicht,* for protestants.

James R. Sullivan, for the State of Illinois and the Illinois Commerce Commission.

REPORT AND ORDER
RECOMMENDED BY GERALD E. JESSUP,
ADMINISTRATIVE LAW JUDGE

By application filed August 13, 1971, The Baltimore and Ohio Railroad Company (B&O), a common carrier by railroad subject to part 1 of the Interstate Commerce Act, seeks a certificate of public convenience and necessity under section 1 (18-20) of the Act permitting abandonment of its branch line of road and operation thereof from station 9738 + 00 at Springfield, Ill., to the end of the line at station 12046 + 06.5 at Beardstown, Ill., a distance of 43.7 miles located in Sangamon and Cass Counties, Illinois. The application was referred to the administrative law judge for hearing and the recommendation of an appropriate order. Hearing was held at Springfield, Ill., July 10 and 11, 1972. Briefs were filed on behalf of most of the parties.

The application for abandonment was supported by the Capital City Railroad Relocation Authority of the City of Springfield as well as the city, and was opposed by 11 parties.[2] The Illinois Commerce Commission asked that this

[2] Vistron Corporation, Illinois Agricultural Association, FS Services, Inc., Cass County Service Co., Mayor of Beardstown, United Transportation Union, Brotherhood of Locomotive Engineers, Brotherhood of Maintenance of Way Employees, Brotherhood of Railway and Airline Clerks, Illinois Lepislative Board and Indiana Legislative Board.

Commission defer action on the matter pending a more complete record, and it takes no position on the merits at this time.

PRELIMINARY MATTERS:

On brief and by petition certain protestants have raised issues which should be here noted and considered.

Applicant has filed with this Commission two abandonment applications relating to separate portions of a 228-mile branch of line extending from Beardstown, Ill., on the Illinois River to Shawneetown, Ill., on the Ohio River. In this proceeding applicant seeks abandonment of the northernmost 43.7 miles known as the Beardstown Branch which extends between Beardstown and Springfield. In Finance Docket 26965 applicant seeks abandonment of the southernmost 73.27 mile portion known as the Shawneetown Branch. Both of these applications were heard by this judge on separate records, FD No. 26965 in June 1972, and FD No. 26745 in July 1972. Separate reports and orders recommended by the Administrative Law Judge in these proceedings are being released simultaneously.

At the hearing in FD-26965 on June 19, 1972, counsel for the applicant announced that a further application was to be filed seeking abandonment of the remaining middle portion of the line (approximately 111 miles).

By petition dated June 26, 1972, filed in both FD-26965 and FD-26745 counsel for certain of the protestants urged reopening of FD-26965, and consolidation of that proceeding with FD-26745 for hearing and decision on a joint record; and also for consolidation of the application proposed to be filed for abandonment of the middle segment with the other two, in order to correlate the

evidence as it pertains to the entire 228 mile branch line. In response to this petition, the B&O has noted that its counsel was in error in announcing that an application for abandonment of the middle part of the branch would be filed inasmuch as that matter was still under management review. The applicant argues that the Beardstown and Shawneetown branches are separated by more than 100 miles and that in 1971, of the 800 cars of freight handled on the Beardstown Branch and 1,705 cars on the Shawneetown Branch, only 14 moved over both branches. Furthermore, the branches are operated separately and may be considered appropriately in separate proceedings.

Each of the proceedings is clearly identifiable and separate, the shippers and their interest are different, and the proposed disposition of the applications are different, based upon different facts and circumstances applicable to the respective applications. Consolidation of the applications for further hearing is neither necessary nor warranted. The order being entered in FD-26965 provides for denial of the petition.

Protestants also have alleged error on the part of the judge in refusing to require the applicant to furnish certain financial data of The Chesapeake and Ohio Railway Company which controls the B&O, and also to furnish data pertaining to the operations on the middle segment of the line, particularly as such operations may be adversely affected by the abandonment of the northern and southern portions as proposed.

Official notice is taken of the annual reports of both the B&O and C&O Railroads. From those reports it is

noted that the B&O balance sheet as of December 31, 1971 shows assets aggregating $1,232,155,307, including current assets of $137,662,775. Its current liabilities were $1[illegible]565,425, and shareholders equity $601,553 408. Its income statement for 1971 shows railway operating revenues of $495,811,770, with a net of $120,599,355. Its maintenance of way and structures expenses for the year was $64,965,815.

For the same period the C&O balance sheet lists total assets of $1,314,876,274 including current assets of $165, 287,045. Its current liabilities were $141,701,729, and shareholders equity $622,026,969. Its income statement noted railway operating revenue of $455,202,257 with a net of $88,036,163. Its maintenance of way and structures expenditure for the year was $60,978,309.

The record clearly notes that certain of the B&O personnel hold similar positions with the C&O and perform duties for both roads. The record also shows the total number of cars of freight which had a movement over both the Beardstown and Shawneetown Branches. It was indicated to the applicant that further data with respect to the cars operated over the Beardstown Branch may be useful showing those which at Sangamon Junction moved to or from the Indianapolis Division and those which moved over the Flora Branch. Counsel for applicant agreed that if the presiding officer so required the data would be supplied, but it was not considered necessary or relevant. The record does show that the predominance of the Beardstown Branch traffic moved to or from the Indianapolis Division. In the circumcumstances the applicant was not required to provide the specific data with respect to the division of the

cars at Sangamon Junction. It is concluded that such information is not essential for a decision in this proceeding.

In view of the financial data available from the annual reports, the operating data noted, and the conclusions herein reached, the rulings with respect to these evidentiary matters are affirmed.

THE LINE:

The lines of the B&O extend generally between Chicago and Springfield, Ill., and St. Louis, Mo., on the west and Philadelphia and Baltimore on the east, with entry into New York City. The proposed abandonment here under consideration involves the Beardstown to Sprinfield, Ill., portion of a 228-mile line which extends from Beardstown in a southerly direction by way of Flora, Ill., to Shawneetown, Ill. At Flora it intersects the main line of the B&O between St. Louis and Baltimore. Immediately south of Springfield at a point called Sangamon Junction there is also a branch which extends by way of Indianapolis, Ind. and Hamilton, Ohio joining the main line between St. Louis and Baltimore at Cincinnati.

On the Beardstown to Springfield segment here proposed to be abandoned there are 11 stations, 8 of which are non-agency stations, 2 are joint-agency, and 1 an open station. The population at these stations range from 0 to 6,200 with 6 having populations under 100. Two are served by other railroads, namely, the Illinois Central Gulf Railroad at Ashland and the Burlington Northern at Beardstown. At Ashland (population 1,137) the agent for the Illinois Central Gulf also acts as B&O agent, and at Beardstown (population 6,208) the Burlington Northern agent acts as B&O agent. Interchange with other railroads is maintained only at Springfield and Beardstown.

Present service on the branch consists of a local freight train making one round trip between Springfield and Beardstown on Monday, Wednesday and Friday. The crew operates between Springfield and Pana on Tuesday, Thursday and Saturday. No passenger service is performed. The crew consists of an engineer, conductor, brakeman and flagman. There have been no changes in this service in the past 2 calandar years. There are 69 highway crossings only 5 of which are protected by automatic flashing light signals. Speed is limited to 25 miles per hour.

The branch line is in very poor physical condition resulting from a long period of deferred maintenance. There are 24.7 miles of 85-pound rail which is between 68 and 74 years old, and except for 3 miles of 100-pound rail the remainder is 90-pound rail between 56 and 65 years old. During 1971 there were 21 service failures of rail. Replacement of rail is necessary. The cross tie condition is very poor and requires immediate replacement of approximately 675 ties per mile (29,500 on the branch), and the roadbed requires considerable work.

Rehabilitation of the line using secondhand 100-pound rail will require an expenditure of approximately $1.6 million. This does not include replacement of bridges, most of which are of timber construction and are more than 40 years old. One of the bridges requires immediate rebuilding at a cost of $220,000 and 2 others need replacement at a cost of $43,000. Within the next 10 years an additional $1.2 million will be needed for bridge replacement. The engineer computed normalized maintenance of the line as approximately $132,000 annually.

TRAFFIC:

The area served is essentially a farming area, sparsely settled, with very little manufacturing. The record discloses the handling of 1,161 cars over the branch in 1969, 1,228 cars in 1970, and 800 cars in 1971. The tonnage in these respective years was 56,879 tons in 1969, 62,954 tons in 1970, and 37,201 tons in 1971.

In accounting for some of the tonnage reduction in 1971, applicant noted that in 1969 it handled 177 cars of freight for the Ashland Farmers Elevator at Ashland, Ill. while in 1970 there were only 58 cars for this shipper. Also in 1970 applicant transported 329 cars of stone products which included a large special intrastate movement to Philadelphia, Ill., for a construction project, while in 1971 it transported only a total of 70 cars of this type of material. The record discloses some tonnage gains during the 3-year period, especially in the handling of food products and electrical and non-electrical machinery, but tonnage decreases in most other categories of freight. The major portion of the farm products shipments involved short hauls, primarily to processors at such points as Decatur, Springfield and Taylorsville, Ill., all within a distance of 100 miles of the origin points.

Over 50 percent of the traffic moving on this segment consists of overhead freight which neither originates nor terminates on it. For example of the 800 cars moving over the branch in 1971, 322 either originated or terminated on the branch, and 478 were overhead cars interchanged with the Burlington Northern at Beardstown. A study of each of these 478 overhead cars reveals that if the proposed abandonment is authorized, the B&O will retain 95 percent of this overhead traffic, using other gateways. The other 5 percent could be handled by other railroads. Ninety percent of the retained overhead freight

would be interlined at East St. Louis which has much better yard facilities and at which point applicant conducts a much larger interchange with the Burlington Northern. The remainder of this retain overhead freight would be interchanged at such points as Springfield, Decatur, and Chicago, Ill.

About 86 percent of the cars of freight handled by applicant on this branch falls into 5 primary commodity categories. In 1971, 36 percent consisted of chemicals or allied products, which is predominantly overhead freight moving from the applicant's Indianapolis Division to destinations in Minnesota and Nebraska. Seventeen percent involved the transportation of lumber or wood products, about half of which is overhead traffic. Nine percent (70 cars) involved the transportation of stone of which 68 cars moved overhead from applicant's Indianapolis Division to Chicago. Approximately 18 percent involved the transportation of food products a major portion of which originated or terminated on the branch. Six percent of the cars involved the transportation of farm products, primarily to processors at Decatur, Springfield, and Taylorsville, Ill. The remaining 14 percent of the cars of freight is divided among some 15 other commodity categories.

REVENUE AND EXPENSES:

Revenues from traffic handled on this branch in the years 1969, 1970 and 1971 respectively totaled $184,515, $207,178, and $167,759. On a mileage prorate basis approximately 1/3 of the total revenue in each year was assigned to the branch and the remainder to the balance of the B&O system.[3] From these revenues applicant

[3] In addition to the revenue to the B&O System there also was a net revenue accruing to the family lines (C&O and Western Maryland Railway) in the respective years of $524, $487, and $232.

realized a net profit in 1969 and 1970 of $16,876 and $27,882 respectively, and a loss of $13,125 in 1971. In these years the maintenance of way expenditures for the branch were only $39,887, $45,817, and $53,468. Applicant contends that had the annual normalized expenditure been made for maintenance ($132,382), it would have resulted in a substantial deficit operation in each year. In computing its costs applicant puported to use those which would be avoided by the abandonment, using actual figures for the branch line and the usual 50 percnet of revenue formula in determing costs on the remainder of the system lines.[4]

Based upon the 1971 traffic, revenue, and cost figures, except substituting normalized maintenance and also including the cost of amortizing the rehabilitation expenditure of $1,630,644 over a 30-year period at 7 percent interest (which applicant computed as $130,452 a year), applicant projects an annual deficit of $217,089 for the future from the operation of this branch. This does not include the bridge replacement program of approximately $1.2 million previously noted which must be completed within the next 10 years.

The accuracy of some of the financial data is open to question. As an example applicant has included the overhead revenue as revenue which would be lost by the abandonment even though the evidence discloses that 95 percent of the overhead traffic would be retained. At the same time it has included overhead costs as saveable ex-

[4] *Chicago & N.W. Ry. Co.*, 282 I.C.C. 525, 531-532.

penses even though the cost of handling the freight will continue to the applicant. The B&O suggests, and probably rightfully, that a realignment of the financial data with respect to the overhead traffic would show the abandonment to result in an even greater advantage to the applicant. Also included as saveable expenses are some labor portions of the maintenance of way and equipment costs which actually have not been established to be avoidable. Overall however, it seems clear that operation of the branch in the future with an adequate maintenance program would result in a deficit operation, or at best a marginal operation.

CITY OF SPRINGFIELD – RAILROAD RELOCATION AUTHORITY:

The city of Springfield and the Capital City Railroad Relocation Authority expressed support for the abandonment. Their support is based upon a plan for relocation of all railroad tracks from central Springfield, which involves the 6 railroads serving Springfield including applicant. The total relocation project is estimated to cost approximately $34 million of which 2 to 3 million is allocated for relocation of the B&O tracks. It is to be noted that this proposed abandonment does not embrace any of the tracks involved in the relocation project, and the project as drafted does not contemplate abandonment of the Beardstown branch. If the abaondonment of the Beardstown branch is authorized the B&O then contemplates a further application to abandon its tracks within the central part of Springfield, which will make unnecessary the relocation of its tracks under the plan, thus saving the Relocation Authority the estimated $2 to $3 million.

ALTERNATE SERVICES:

Rail service is available at Beardstown by the Burlington Northern, at Ashland by the Illinois Central Gulf, and at Springfield by the Illinois Central Gulf, Norfolk and Western Railway Company,Illinois Terminal Railroad Company, Chicago and Illinois Midland Railway Company, and the applicant. A number of motor common carriers of general commodities serve the points along the line, as well as several motor carriers handling grain shipments. In addition to the motor common carrier services, the record shows that several of the elevators located on the Beardstown branch operate their own trucks. The fact that only two shippers or receivers of freight opposed the abandonment is indicative of the availability of transportation services to meet the public needs in this area.

SHIPPER OPPOSITION:

Only 2 shippers appeared in opposition to the proposed abandonment. The Sohigro Service Division of Vistron Corp., which is a wholly-owned subsidiary of Standard Oil Company (Ohio), operates a retail distribution outlet at Virginia, Ill., for its fertilizer and fertilizer materials. It has an investment of approximately $130,000 at this location and depends upon the B&O service for receipt of its supplies. The availability of rail service was stated to have been a prime factor in the decision to locate the plant at Virginia. In 1971 it received about 900 tons by rail, some of which originated at points as far distant as Florida and Canada. Its total rail freight bill for the year was $10,762, of which the B&O received only a small portion as its appropriate division. Use of alternate transportation modes or combinations is considered economically unfeasible by the witness, inasmuch as it would increase transportation costs for the 1971 volume by approximately $4,600.

other shipper opposing the abandonment is Cass County ice Co. which is a modified farmers co-op also located Virginia, Ill. It has been in business for 12 years and has annual sales of approximately $3 million. It operates a bulk-blend fertilizer plant and grain elevator at this location. In its fiscal year 1970-1971, it received 3,200 tons of fertilizer materials (approximately 50 carloads). The proposed abandonment of rail service would result in an increase in its transportation costs. This may result in the loss of some business to its competitors at Beardstown and Ashland which have alternate rail service. Truck service is used for its grain shipments of approximately 600,000 bushels per year which go to the river terminal at Beardstown, about 12 miles away.

UNITED TRANSPORTATION UNION – MAYOR OF BEARDSTOWN:

In opposing the proposed abandonment, the witness for the United Transportation Union noted that the 4-man crew which operates the Beardstown branch 3 days a week also operates a round-trip between Springfield and Pana the other 3 days. The abandonment would affect 2 men on the Beardstown crew who live in Springfield. Their job opportunities with the B&O would be at Washington, Ind. (180 miles from Springfield), East St. Louis, Ill. (about 90 miles from Springfield), or Flora (about 135 miles).

The mayor of Beardstown, who also is an employee of Bulrington Northern, expressed the view that abandonment of the B&O's Beardstown Branch would adversely affect the ability of the community to attract new industry.

ENVIRONMENTAL CONSIDERATION:

On brief protestant Cass County Service Co. urges that if this abandonment is permitted, it will require 160 truckloads of 20 tons each to move the 3,200 tons of fertilizer materials which it receives annually by rail, assuming its business to remain constant. It argues that the trucks will pollute the air, break up the highways, create traffic congestion, and increase safety hazards. It further urges that considering the projected annual loss of $226, 257 (recomputed $217,089) which the B&O may avoid by the abandonment, the railroad should be required to immunize protestant against any increase in its transportation costs for obtaining its supplies for a period of 5 years; and further that applicant should be required to provide a substituted truck for rail service during that period, plus transloading facilities at Springfield.

No evidentiary data was presented concerning the alleged adverse environmental impact which abandonment of the rail line may generate. This absence of evidence embraces data with respect to the density of the material involved for determining the truckload factor, the distances traveled, present and anticipated future pollution levels in the area, traffic levels and patterns which may be affected, and various other data from which a conclusion may be drawn concerning the issue. Notwithstanding this lack of precise information it would appear that the volume of truck traffic which would be generated by the abandonment is relatively insignificant, both quantitatively and from an environment pollution aspect. In the circumstances, it must be concluded that permitting the proposed abandonment would not seriously affect the quality of human environment within the meaning of the National Environmental policy Act of 1969.

FURTHER DISCUSSION AND CONCLUSIONS

In deciding whether the public convenience and necessity will permit abandonment of this branch, consideration must necessarily be given to the public need for the service provided by the line, the use being made of it, the traffic potential in the area, the revenues that reasonably may be expecfed to accrue from the operations over the branch, the expenses involved, and the financial ability of the carrier to continue its operation.

The record amply supports the conclusions that under the most charitable view actual operation of the branch in its present condition is at best, financially marginal. That the B&O will have to rehabilitate the branch at a very great cost in order to continue its safe operation is uncontraverted. Even assuming that the combined resources of the B&O and its contrbllig C&O can affford the rehabilitation expenditure, a question arises whether the profitability of the branch justifies the expenditure, and also whether the public need for the branch warrants it.[5]

There is no possibility that the costs of rehabilitation can be recouped from the earnings of the branch. While the overall prosperity of a carrier is to be considered in balancing the issues of public convenience and necessity against undue burdens on interstate commerce this factor is not controlling.[6] A carrier should not be required to continue indefinitely operation of a branch line which will

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[5] cf *East Carolina Ry. Abandonment*, 324 I.C.C. 506, 514.

[6] *Chesapeake & O. Ry. Co. Abandonment*, 331 I.C.C. 889, 902, aff. sub nom *Asbury v. United States*, 298 F. Supp. 589 (1969).

not pay the cost of operation, maintenance and taxes on the theory that the system as a whole is profitable.[7] The Commission and the Courts often have expressed the view that improvident expenditures by a common carrier should not be required by governmental fiat.[8] The point at which abandonment is considered justified is a matterl of sound judgement to be determined by the circumstances of each case.

Here the record shows that in 1971, 59 percent of the 800 cars of freight handled over the branch constituted overhead traffic, 95 percent of which the B&O will retain through other gateway connections if teh abandonment is approved. Only 322 cars contained freight which either originated or terminated on the branch. Of these, 103 cars contained food or kindred products and 75 cars contained lumber or wood products, aggregating 55 percent of the cars moving to or from points on the branch. Yet, the only 2 shippers who appeared in opposition to the abandonment use the rail service for receipt of fertilizer materials. One received 900 tons in 1971, aggregating freight charges of $10,762, only a small portion of which accrued to the B&O; and the other received approximately 50 carloads. The one asserted that use truck services would increase its annual freight expenses by approximately $4,600 and the other by approximately $11,950.

The paucity of shipper opposition to the proposed abandonment also is a factor to be considered. The fact that the 2 shippers here opposing the abandonment may

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[7] cf *New York Central R. Co. Abandonment*, 254 I.C.C. 745, 761.; *Missouri-Kansas-Texas R. Co. Abandonment*, Okla., 338 I.C.C. 728, 741-742.

[8] cf *Purcell v. United States*, 315 U.S. 381 (1942).

experience some increase in their transportation costs through the use of alternate services is not to be determinative of whether this low traffic density branch line should be abandoned. An unprofitable operation can not be expected to be continued for the profit of a few shippers who may be adversely affected.[9] Furthermore, the evidence indicates no future potential for increased tonnage over the branch.

Considering the small amount of traffic moving over the line, the carrier's ability to retain in excess of 50 percent of the traffic through the use of other gateways, the absence of any foreseeable traffic potential, the marginal nature of the operation, the large rehabilitation costs necessary to continue it, and the general lack of interest by shippers in continuance of the branch operation, it is concluded that the present and future public convenience and necessity permit abandonment of the branch line.[10]

In order to protect the employees who may be adversely affected by the action herein authorized, the usual conditions for the protection of employees as prescribed in Chicago, B&Q R. Co. Abandonment 257 I.C.C. 700 will be incorporated.

Contentions of the parties as to fact or law not specifically discussed herein have been given consideration and found to be not of controlling significance or unwarranted.

The requested findings to the extent not granted herein are denied.

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[9] *Chesapeake & O. Ry. Co. Abandonment,* 242 I.C.C. 622, 628.

[10] cf *St. Louis S.W. Ry. Co. of Texas Abandonment,* 290 I.C.C. 53, 73-74.

ULTIMATE FINDINGS, CERTIFICATE, AND ORDER

The administrative Law Judge finds that, subject to the conditions for the protection of railway employees prescribed by the Commission in *Chicago, B.&Q. R. Co., Abandonment,* 257 I.C.C. 700, the present and future public convenience and necessity permit abandonment by The Baltimore and Ohio Railrad Company of its Beardstown Branch line of road and operation thereof from Valuation Station 9738 + 00 at Springfield, Ill., to the end of the line at Valuation Station 12046 + 06.5 at or near Beardstown Ill., located in Sangamon and Cass Counties, Illinois; and further that this decision is not a major Federal Action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

Premises considered, it is the Certificate and Order of the Administrative Law Judge that:

Subject to the conditions for the protection of railway employees referred to above, the present and future public convenience and necessity permit the abandonment by The Baltimore and Ohio Railroad Company of its Beardstown Branch line of road and operation thereof from Valuation Station 9373 + 00 at Springfield, Ill., to the end of the line at Valuation Station 12046 + 06.5 at or near Beardstown, Ill., located in Sangamon and Cass Counties, Illinois.

If the authority herein is exercised, The Baltimore and Ohio Railroad Company shall submit for consideration two copies of the journal entries showing the retirement from service of the line herein permitted to be abandoned.

Tariffs applicable to the line herein permitted to be abandoned may be cancelled on or after the effective

date hereof upon notice to the Commission and to the general public by not less than 10 days filing and posting in the manner presecribed in Section 6 of the Interstate Commerce Act.

When filing schedules cancelling tariffs applicable to the line to be abandoned, The Baltimore and Ohio Railroad Company shall, in such schedules, refer to this certificate and order by date and docket number.

The authority herein granted shall not be exercised prior to the date of service of an order adopting this certificate and order as the certificate and order of the Commission or a notice stating that it has become the certificate and order of the Commission.

Unless the authorization herein granted is exercised within one year from the effective date hereof, this certificate and order shall be of no further force and effect.

By the Commission, Gerald E. Jessup, Administrative Law Judge.

Dated at Washington, D.C. this 31st day of January 1973.

ROBERT L. OSWALD

Secretary.

(SEAL)

APPENDIX F

SERVICE DATE
JUN 23 1975

Finance Docket No. 26745

THE BALTIMORE AND OHIO RAILROAD COMPANY ABANDONMENT BETWEEN COAL SHAFT AND BEARDSTOWN, IN SANGAMON AND CASS COUNTIES, ILLINOIS

Finance Docket No. 26965

BALTIMORE & OHIO RAILROAD COMPANY ABANDONMENT BETWEEN RINARD AND SHAWNEETOWN, IN CLAY, WAYNE, WHITE AND GALLATIN COUNTIES, ILLINOIS

Docket No. AB-19 (Sub-No. 27)

BALTIMORE AND OHIO RAILROAD COMPANY ABANDONMENT BETWEEN FLORA AND SANGAMON JUNCTION, IN CLAY, EFFINGHAM, FAYETTE, SHELBY, CHRISTIAN, AND SANGAMON COUNTIES, ILLINOIS

PRESENT: KENNETH H. TUGGLE, Commissioner, to whom the matter which are subject of the order have been assigned for action thereon.

Upon consideration of the record in the above-entitled proceeding, including the petition to consolidate the above-entitled applications for hearing and disposition, filed jointly by the State of Illinois, Thomas J. Duggan, and J. Thomas

McNeal, on May 8, 1975; the Recommended Reports and Orders of Administrative Law Judge Gerald E. Jessup, both served February 14, 1973 which denied the application in F.D. No. 26965 and granted the application in F.D. No. 26745; and the reply of The Baltimore and Ohio Railroad Company, filed May 23, 1975;

It appearing, That concurrent handling and disposition of the above-entitled proceedings is not warranted and would unnecessarily result in an undue delay of a final decision in each proceeding:

It is ordered, That the petition be, and it is hereby, denied.

By the Commission, Commissioner Tuggle.

Dated at Washington, D.C., this 17th day of June, 1975.

JOSEPH M. HARRINGTON

(SEAL) Acting Secretary

NOTE: This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

Appendix G

SERVICE DATE
NOV 14 1975

DECISION, CERTIFICATE & ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Review Board Number 5, held at its office in Washington, D.C., on the 3rd day of November, 1975.

Finance Docket No. 26745

THE BALTIMORE AND OHIO RAILROAD COMPANY
ABANDONMENT BETWEEN COAL SHAFT AND
BEARDSTOWN IN SANGAMON AND
CASS COUNTIES, ILLINOIS

Upon consideration of the record in the above-entitled proceeding, including the initial decision of the Administrative Law Judge served February 14, 1973, the exceptions filed jointly filed by Illinois Commerce Commission, the people of the State of Illinois, the City of Beardstown and the United Transportation Union on March 10, 1973, the exceptions filed jointly by the Illinois Agricultural Association, F.S. Services, Inc., and Cass County Service Company on March 12, 1973, and the reply of the Baltimore & Ohio Railroad Company filed April 1, 1973; and

It appearing, That the findings and conclusions of the Administrative Law Judge with respect to all matters, fact and law considered and discussed in his report are, in all respects, proper and correct; that the exceptions of protestants and reply of applicant raise no new or material issues of fact or law not adequately considered and properly disposed of by the Administrative Law Judge in his report; and that said exceptions and reply thereto otherwise ar not of such a nature to require the issuance by this Board of a report discussing the evidence in light of such pleadings;

It further appearing, That an environmental threshold assessment survey has been prepared by this Commission and made available for public inspection upon request; that such survey has found that no significant impact on the

environment would result from the approval of the application; that by order, Commissioner Tuggle dated February 7, 1975, it was determined that based on the aforesaid threshold assessment survey, no environmental impact statement need be issued in this proceeding, as it does not represent a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. §4321, et. seq.; that appropriate notice of such termination has been published as directed by this Commission; that this Commissior received no substantive comments as to said determination as of the date hereof; that said threshold assessment survey is a part of the record in this proceeding and has been considered herein; and that the economic advantages to be gained from abandonment outweigh any adverse environmental factors.

Wherefore, and good cause appearing therefor:

We find, that the evidence considered in the light of the exceptions and reply thereto does not warrant a result different from that reached by the Administrative Law Judge; and that the statement of facts, the conclusions and findings of the Administrative Law Judge being proper and correct in all materials respects, should be, and they are hereby, affirmed and adopted as our own;

It is ordered, That subject tot the conditions stated therein to protect employees, the recommended certificate and order of the Administrative Law Judge served February 14, 1973 permitting the Baltimore & Ohio Railroad Company to abandon that portion of its line between Coal Shaft and Beardstown and Sangamon and Cases Counties, Illinois approximately 43.7 miles in length be, and it is hereby, adopted as a certificate and order of the Commission, Review Board Number 5, effective 35 days from date of service hereof.

By the Commission, Review Board Number 5.

ROBERT L. OSWALD
Secretary

Appendix H

SERVICE DATE
JUN 1 1976

ORDER

At a Session of the INTERSTATE COMMERCE COMMISION, Division 3, acting as an Appellate Division, held at its office in Washington, D.C., on the 18th day of May, 1976.

Finance Docket No. 26745

THE BALTIMORE AND OHIO RAILROAD COMPANY
ABANDONMENT BETWEEN COAL SHAFT AND
BEARDSTOWN IN SANGAMON AND CASS
COUNTIES, ILLINOIS

Upon consideration of the record in the above-entitled proceeding, including the decision, certificate and order of Review Board Number 5, dated November 3, 1975, the joint petition for reconsideration filed December 8, 1975, by Illinois Agricultural Association, FS Services, Inc., and Cass County Service Company, the joint petition for reconsideration filed December 15, 1975, by the State of Illinois, the City of Beardstown, and United Transportation Union, with the said petitions also asking for consolidation of the instant proceeding with Finance Docket No. 26965, in which the Baltimore & Ohio Railroad Company seeks abandonment between Rinard and Shawnestown, in Clay, Wayne, White and Gallatin Counties, Ill., and docket No. AB-19 (Sub-No. 27), in which the Baltimore and Ohio Railroad Company seeks abandonment between Flora and Sangamon Junction in Clay, Effingham, Fayette, Shelby,

Christian and Sangamon Counties, Ill. (with the second above-noted petition asking, in the alternative, for consolidation with docket No. AB-19 (Sub-No. 27 alone), and applicant's reply to the petition:

It appearing, That previous requests for consolidation have been denied in this proceeding, including the order of Commissioner Taggle, dated June 17, 1975, which denied the proposed consolidation with Finance Docket No. 26965 and docket No. AB-19 (Sub-No. 27); that the instant petitions set forth no material facts or arguments of any substance which were not previously considered by the decision, certificate and order of Review Board Number 5; and that reconsideration is not warranted;

It further appearing, That this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Act of 1969; and

It further appearing and the said Division, acting as an Appellate Division affirms, That the present and future public convenience and necessity permit abandonment by The Baltimore and Ohio Railroad Company of the above-described line of railroad, subject to the condition that employees shall be entitled for protection, to the conditions as set forth in *Chicago, B. & Q. R. Co. Abandonment,* 257 I.C.C. 700;

It is ordered, That the petitions be, and they are hereby, denied;

It is further ordered, That in the event any person or government entity is considering an offer of financial assistance to enable the rail service involved to be continued, then such person or government entity should promptly give notice that it is considering such an offer by certified mail to carrier applicant and by first class mail to all parties of record and the Commission;

It is further ordered, That applicant railroad shall, within 10 days after receiving notice that an offer of financial assistance is being considered, make available to the party considering the offer of financial assistance the information described under the heading "Railroads Seeking Abandonment Authority", which appears in the attached Notice of the Commission entitled "Procedures for Pending Rail Abandonment Cases", served March 31, 1976, and published on that date in the Federal Register, 41 FR 13691 (hereinafter called the Procedures), and such information shall be made available in the manner described in the Procedures;

It is further ordered, That this order being administratively final, notice of the finding of public convenience and necessity made herein shall be published in the Federal Register pursuant to the requirements of section 1a(6)(a) of the Interstate Commerce Act, as amended;

It is further ordered, That, notwithstanding any notice that financial assistance is being considered that may have been given pursuant to the above ordering paragraph, any person or government entity desiring to offer financial assistance to enable the rail service involved to be continued shall, within 15 days of publication in the Federal Register of the above-described finding of public convenience and necessity, send notification of such offer by certified mail to applicant railroad and the Commission and by first class mail to all parties of record, and such notification shall include the terms and information described under the hearing "Persons Offering Rail Service Assistant", which appears in the Procedures;

It is further ordered, That if the Commission finds that a financially responsible person has offered financial assistance in accordance with the Procedures, the Commission shall postpone the issuance of a certificate of abandonment for such

reasonable time, not to exceed 6 months, as is necessary to enable such person or government entity to enter into a binding agreement with the applicant railroad to provide financial assistance for continued rail service or to purchase the rail line;

It is further orderd, That when the Commission is informed of the execution of any financial assistance agreement or acquisition and operating agreement, the issuance of the certificate of abandonment shall be posponed for such period of time as such an agreement (including any extensions or modifications) is in effect;

It is further ordered, That all correspondence to the Commission with respect to offers of financial assistance for the continued operations or acquisition of the subject line shall contain an appropriate reference to the subject proceeding; and that on the lower left hand corner of envelopes containing such correspondence the following notation shall be typed in boldface "AB-RSCP";

It is further ordered, That subject to the conditions set forth above, an appropriate certificate of abandonment shall be issued, and the applicant shall not effect any a abandonment or discontinuance of service prior to the effective date of such certificate of abandonment.

And it is further ordered, That the decision and order of Review Board Number 5 dated November 3, 1975, shall be effective on the date this order is served.

By the Commission, Division 3, acting as an Appellate Division, Commissioners Brown, MacFarland and Corber.

ROBERT L. OSWALD,
Secretary

(SEAL)

SERVICE DATE
March 31, 1976

INTERSTATE COMMERCE COMMISSION
Washington, D.C.

NOTICE

PROCEDURES FOR PENDING RAIL ABANDONMENT CASES

Information to interested persons concerning the implementation of section 1a(8) of the Interstate Commerce Act, as amended by the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210, enacted on February 5, 1976, which relates to abandonment or discontinuance of operations proceedings filed prior to the promulgation of new regulations pertaining to such proceedings.

General

The purpose of this Notice is to provide information about the Interstate Commerce Commission's proposed means for handling pending railroad abandonment and discontinuance proceedings and the procedures it will follow in processing abandonment applications already on file or filed before final regulations are effective. "Abandonment" means the elimination of a rail line and includes a discontinuance of operations. "Discontinuance" means only the cessation of operations over the line. The term "abandonment" is used in this notice to embrace both situations.

Changes in the Commission's abandonment procedures were made necessary by the enactment, on February 5, 1976, of the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94-210). The need to process some 200 pending rail abandonment applications makes it imperative that these procedures be instituted as soon as possible, and precludes the opportunity for public comment at this time.

The procedures described in this Notice are of an interim nature and will apply, effective upon the date of their publication, to all cases in which the Commission authorizes the abandonment of a line of railroad pursuant to an application currently on file with it or filed before final regulations are effective. The Commission will soon issue a notice of proposed rulemaking looking toward the issuance of permanent regulations to govern subsequently filed abandonment applications. The procedures set forth in this Notice may be modified in view of the results of that proceeding.

BEST COPY AVAILABLE

New Abandonment Provisions

The procedures described in this Notice implement new paragraphs 1a(6) and (7) of the Interstate Commerce Act. Those paragraphs contain new provisions under which—

1. The Commission must provide public notice, through Federal Register publication, of each instance in which it finds that the public convenience and necessity would permit a railroad to abandon trackage or discontinue service.

2. Persons, including governmental entities, wishing to preserve rail freight service set for discontinuance or abandonment may offer to purchase the line for continued operation or provide financial assistnce to the railroad in the form of a "rail service continuation payment" (which may be conveniently termed an operating subsidy). In the words of new paragraph 1a(6) of the Interstate Commerce Act, the financial assistance must "(A) cover the difference between the revenues which are attributable to such line of railroad and the together with a reasonable return on the value of such line; or (B) cover the acquisition cost of all or any portion of such line of railroad."

3. If, within 30 days after publishing its finding that a proposed abandonment should be authorized, the Commission finds that a "financially responsible" person has made an offer likely to cover the losses on the line plus a reasonable profit, or to cover the cost of acquisition of all or any portion of such line, it must postpone the issuance of the certificate abandonment (thus, in effect, requiring that service continue) for a period up to 6 month while negotiations for financial support take place. By the end of that 6 month period a binding agreement must be executed by the railroad and the offeror or a certificate authorizing the requested abandonment will be issued.

4. The applicant railroad is required to make available promptly to any person considering an offer or financial assistance its latest information about the physical condition of the line and data sufficient to permit computation of the amount of subsidy needed to justify continued operation.

5. Whenever an offer of financial assistance is made, the Commission must determine the amount by which the avoidable costs attributable to the line, plus a reasonable return on the value of the rail properties involved, exceed the revenues attributable to the line, thus providing assistance to any offeror of a subsidy in

determining the amount that would have to be paid. The Standards for Determining Rail Service Continuation Subsidies, 49 CFR §1125, adopted by the Commission's Rail Services Planning Office for the development of estimated subsidy payments under the Regional Rail Reorganization Act of 1973, shall be used in developing estimated payments under these new provisions.

6. The Commission must postpone the issuance of the certificate of abandonment for the period that any assistance or acquisiton and operating agreement remains in effect.

The Local Rail Service Assistance Program

The new abandonment provisions of the Interstate Commerce Act are related to other provisions of Public Law 94-210. Section 803 of that act establishes a nationwide local rail services assistance program, to be administered by the United States Department of Transportation, under which the Federal Government may reimburse the States for all or a portion of the funds expended by them in preserving or improving local rail freight service. The program becomes effective July 1, 1976, and extends through June 30, 1981. To be eligible for Federal aid, a State must develop a State rail services plan acceptable to the Secretary of Transportation, and comply with certain other statutory requirements and with regulations to be issued by the Secretary.

In deciding how to implement the new abandonment provisions of the Interstate Commerce Act, the Commission has considered the local rail service assistance program. While recognizing that the States will need some time to prepare to take advantage of this program, the Commission has determined that there is no need to delay the processing of ponding rail abandonment cases. Relatively few of them are in the final stages where an "administratively final" Commission order is imminent. An order of the Commission's employee boards, commonly called review boards, becomes administratively final upon the failure of any party to seek reconsideration of a board's decision. The initial decision of an Administrative Law Judge becomes administratively final if exceptions are not filed, unless the decision is stayed by the Commission. In most instances, a decision of the Commission or a division of the Commission becomes administratively final on the date on which it is served.

While it is our intention to process pending abandonment cases to their conclusion, any finding that an abandonment should be authorized will be made subject to conditions to assure that any

State or individual considering making an offer of financial assistance will be given time to pursue that end, in accordance with the time limits discussed below. It would facilitate the processing of these cases, and enable the Commission to better deal with rail assistance proposals if persons interested in making such proposals could make that fact known as early as possible in each abandonment proceeding. Any party considering the making of an offer of financial assistance may do so at any time during the pendency of the abandonment proceeding. Notice of the intention to offer financial assistance must be in written form, with appropriate reference to the proceeding involved, and must be served by certified mail upon the carrier seeking abandonment and first-class mail upon all parties of record and the Commission.

It should be emphasized that submission of the notice of intent to offer financial assistance will not be used as an element supporting a decision authorizing an abandonment. The purpose of the notice is to provide persons with the information necessary to decide whether to offer financial assistance; to afford the railroads an opportunity to provide the required information; and to facilitate the Commission's action on the offer.

The Commission's Abandonment Procedure

In finding that any abandonment of rail freight service should be authorized, the Commission will impose conditions giving full effect to the provisions of the new law providing for the retention of service through rail service assistance payments. No certificate authorizing an abandonment will be issued until the finding that the abandonment should be authorized is served upon all parties and the governor of each State in which the trackage is located, and is published by notice in the Federal Register.

Issuance of the certificate of abandonment will be postponed for up to 6 months if, within 15 days of the publication of the Federal Register notice, the Commission receives notice that an offer of financial assistance has been made by a person shown to be financially responsible and determines that the offer is likely to cover the cost of acquiring all or part of the line or the losses incurred in operating the line plus a reasonable return on the value of the line.

The Commission will adopt the same conceptual approach developed by the Rail Services Planning Office in connection with the regional subsidy program authorized by the Regional Rail Reorganization Act of 1973 for the purposes of estimating the subsidy payment. It is recognized that there are statutory

differences in the two programs. These differences relate primarily to the exclusion of a management fee in the national program, the inclusion of certain additional costs as set forth in section 1a(11) of the Interstate Commerce Act, and the basis upon which a reasonable return is to be calculated. The Commission will take these differences into consideration in establishing the subsidy payment. The Rail Services Planning Office, whose address appears at the end of this notice, will provide copies of the standards as well as technical assistance to the railroads and to potential subsidizers in developing the estimates.

For the Commission to postpone the issuance of a certificate for a period not to exceed 6 months, to allow an offeror and the railroad to enter into a binding agreement for financial assistance, the notification to the Commission of an offer must include information sufficient to support the statutory finding that the assistance offered is likely to cover the difference between the revenues attributable to the line of railroad and the avoidable cost of providing freight service over that line plus a reasonable return on the value of that line, or that it is likely to cover the acquisition cost of all or a portion of the line. The Commission is required by section 1a(6)(a)(ii) to make such a finding before postponing the issuance of a certificate.

When the Commission by order postpones issuance of a certificate for up to 6 months, the railroad and the offeror have that period to execute an assistance or acquisition and operating agreement. Upon notification that such a binding agreement has been executed, the Commission shall further postpone the issuance of a certificate for the period such an agreement is in effect, including extensions. The Commission's abandonment order will provide that issuance of a certificate of abandonment will be postponed if the railroad and the person offering assistance enter into a binding agreement for continued operations and that the postponement will be for the period of the agreement.

Such an agreement may be based on any form of financial assistance acceptable to the railroad and the person offering financial assistance. From time to time in abandonment proceedings before the Commission, railroads allege that the cost of rehabilitation necessary for efficient operation is so high that continued operations are economically infeasible. Therefore, instances may arise in which a railroad will accept an offer to finance rehabilitation of a line and will enter into a financial assistance agreement providing for continued operations on that basis. For example, a State or other interested person might

rehabilitate the line, and the railroad, relieved of the rehabilitation cost, may then be able to operate the line at a profit. As previously noted rehabilitation costs paid for by a State may be eligible for reimbursement by the Federal Government.

If a binding agreement is not reached because of the railroad's refusal to accept an offer which the Commission finds sufficient to satisfy the statutory requirements for continued operation under subsidy, the abandonment proceeding may be reopened within the 6-month postponement period so that the Commission, on the basis of the new facts, may reconsider the question of whether the abandonment should be authorized.

A further condition will be imposed that requires the railroad to make available its most recent reports on the physical condition of the line, and information making it possible to compute an adequate rail services continuation payment, to any person notifying the railroad that he is considering making an offer of financial assistance requiring such information.

The certificate issued by the Commission in an abandonment proceeding will be made subject to such conditions as may be required by the public convenience and necessity, and shall include provisions for the protection of the interests of railroad employees.

Persons Offering Rail Service Assistance

Because of statutory time limits imposed upon the Commission, anyone making an offer of financial or other assistance in order to provide for the continuation of rail freight service that would otherwise be abandoned, should make certain that the Commission receives notice of such offer within 15 days of the publication in the Federal Register of notice of the finding that the abandonment should be authorized. That notification should include:

1. A copy of a firm offer to provide assistance, stating clearly the amount of money or other consideration offered and any terms or conditions to the offer. The offeror should certify that the offer has been made to the railroad.

2. Information demonstrating the financial reponsibility of the person making the offer. The offeror should submit evidence demonstrating that it has, or will have at the time the proposed agreement is to be executed, appropriate authority, and the necessary funds, to enter into and fulfill contracts of the kind contemplated. If the offeror is not a government entity, the information demonstrating financial responsibility must include, but need not be limited to:

(a) A balance sheet showing its financial condition as of the latest available date but no more than 6 months prior to the date of the notification to the Commission, and

(b) An income statement showing its revenues, expenses, and net income for the current calendar year to the latest available date and for each of the two preceding calendar years.

3. Information sufficient to support a finding by the Commission that the assistance being offered is likely to cover the difference between the revenues attributable to the line of railroad and the avoidable costs of providing rail freight service over the line, plus a reasonable return on the value of the line; or that it is likely to cover the cost of acquiring all or a portion of the line.

Railroads Seeking Abandonment Authority

A railroad which is an applicant for authority to abandon a line of railroad or a rail service shall be required to make available to any person informing it that it is considering offering financial assistance and requesting such information, within 10 days of receiving such notification whether such notification is received before or after the publication in the Federal Register:

1. Its most recent reports on the physical condition of the line of railroad which is the subject of application.

2. A current report on the train service on the line and a current report on the traffic and revenue attributable to the line.

3. An actual computation of the extent to which the avoidable cost of providing rail freight service on such line of railroad, plus a reasonable return on the value of the rail properties involved, exceed the revenues attributable to such line of railroad, as determined by the Standards for Determining Rail Service Continuation Subsidies, 49 CFR §1125.

The information described above shall either be furnished to the offeror of financial assistance or be made available for examination, during regular working hours, at a location within each State within which is located the line of railroad which is the subject of the abandonment application or some other location acceptable to the offeror. Information concerning the nature, kind, quantity, destination, consignee, or routing of traffic shall, in the railroad's discretion, be made available to the offeror, provided all affected parties consent or disclosure is otherwise made in accordance with section 15(11) of the Interstate Commerce Act, 49 U.S.C. §15(11).

Compliance with Time Limits

In view of the statutory requirements imposed upon the Commission, all parties, both offerors of financial assistance and railroads seeking certificates for abandonment or discontinuance of lines of railroad, will be required to adhere strictly to the time limits set forth in this Notice. Failure to do so could prevent the Commission from making its required findings within the 30-day statutory period, and may result in an adverse decision to the party in default.

Rail carriers which have pending applications seeking authority to abandon or discontinue lines of railroad should consider, at least in proceedings under protest, supplementing their applications with the material necessary for parties to determine the possible requirements for rail service continuation payments or acquisition of the line in order to continue rail service. Persons considering making an offer of a rail continuation payment, in order to provide for continued service over a line for which a certificate for abandonment or discontinuance is being sought, should indicate their intention without delay—if possible, prior to the publication in the Federal Register of the Commission's findings.

In order to expedite the handling of submissions to the Commission, envelopes mailed to the Commission either by carriers or offerors should have the initials AB-RSCP printed in the lower left-hand corner, and the docket number of the proceeding, if known.

Further Information

Persons wishing information about the status of a particular abandonment proceeding or about the filing of pleadings, requests for leave to intervene, and similar procedural matters should contact the Section of Finance, Interstate Commerce Commission, 12th Street and Constitution Avenue, N.W., Washington, D.C. 20423 (telephone: 202-275-7245).

Persons desiring information about the rail freight services assistance program or about the computation of assistance payments should contact the Rail Services Planning Office, Interstate Commerce Commission, 1900 L. Street, N.W., Washington, D.C. 20036 (telephone 202-254-3281).

By the Commission.

Dated March 24, 1976.

ROBERT L. OSWALD
Secretary.

(SEAL)

Appendix I

FINANCE DOCKET NO. 27506[1]

PRAIRIE TRUNK RAILWAY—ACQUISITION AND OPERATION—BETWEEN FLORA AND SHAWNEETOWN IN CLAY, WAYNE, WHITE, AND GALLATIN COUNTIES, ILL.

Decided February 17, 1977

1. In Finance Docket No. 27506, certificate issued authorizing the acquisition and operation by Prairie Trunk Railway of a line of railroad between Flora and Shawneetown, Ill., and assignment of certain trackage rights over a portion thereof, subject to certain prescribed conditions.
2. In Finance Docket No. 27507, authority granted to Prairie Trunk Railway to issue not exceeding 750,000 shares of no-par common stock with a stated value of $1 per share, the proceeds of which to be used for the acquisition and operation of the line of railroad herein authorized to be acquired, and application in all other respects denied.
3. In Finance Docket No. 27728, authority granted to Trans-Action Associates, Incorporated, to control Prairie Trunk Railway as a wholly owned subsidiary subject to certain conditions.
4. In Finance Docket No. 26965 application of the Baltimore and Ohio Railroad Company for authority to abandon the line of railroad to be acquired by Prairie Trunk Railway dismissed.

Samuel W. Witwer, Jr., for applicants in F.D. Nos. 27506, 27507, and 27728.

Richard B. Allen for applicant in F.D. No. 26965.

Gordon P. MacDougall for protestants in each application.

William J. Scott, Peter A. Fasseas, James R. Sullivan, Hercules F. Bolos, and *Helga Huber* for the State of Illinois and the Illinois Commerce Commission protestants in each application.

Robert L. Graves for protestants in F.D. Nos. 26965, 27506, 27507, and intervener in opposition in F.D. No. 27728.

Byron F. Andrews, Jr., for protestants in F.D. No. 26965 and interveners in support in F.D. No. 27506.

David G. Abraham for interveners in support in F.D. No. 27506.

[1] This report embraces Finance Docket No. 27507, Prairie Trunk Railway Securities, and Finance Docket No. 27728, Trans-Action Associates, Incorporated—Control—Prairie Trunk Railway, Finance Docket No. 26965, Baltimore & Ohio Railroad Company Abandonment Between Rinard and Shawneetown, in Clay, Wayne, White, and Gallatin Counties, Illinois.

George P. Sheahan for protestant in F.D. Nos. 26965, 27506, and 27507.

Thomas F. McFarland for intervener in F.D. No. 27506.

Thomas G. Woodall for intervener in support in F.D. No. 27728.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS BROWN, MACFARLAND, AND CLAPP

BY DIVISION 3:

These proceedings were heard on separate records but, as they involve matters which are interrelated in effect, are herein consolidated for disposition in a single report.

By application filed December 22, 1971, in Finance Docket No. 26965, The Baltimore & Ohio Railroad Company (B&O or Chessie System), a common carrier by railroad subject to part I of the Interstate Commerce Act, seeks a certificate of public convenience and necessity under section 1 (18-20) of the act permitting the abandonment of operations over its branch line between Flora and Shawneetown extending from Station 3869 + 50 near Rinard, Ill., to Station 0 + 00 at Shawneetown, Ill., a distance of 73.27 miles and abandonment of the line itself from Station 3869 + 50 to Station 319 + 13.7 near Junction, Ill., and from Station 36 + 56.2 near New Shawneetown, Ill., to Station 0 + 00, a total distance of 67.91 miles[2]; all in Clay, Wayne, White, and Gallatin Counties, Ill. This proceeding was the subject of an oral hearing before an Administrative Law Judge held at Carmi, Ill., June 19 through June 22, 1972. By report and recommended order served February 14, 1973, the Administrative Law Judge noted that while the volume of traffic handled over the line had been marginal at best, B&O's efforts to exploit the traffic potential in the area had been apathetic. He questioned the need for the $2.5 million capital expenditure for road rehabilitation projected by B&O and, concluding that the branch was capable of generating sufficient freight to sustain its operation, including normalized maintenance, recommended that the application for abandonment be denied. Exceptions to this report and recommended order were filed by applicant B&O to which joint replies were filed by protestants Illinois Agricultural Association, FS Services, Inc., Wabash Valley Service Company, White Valley Farm Bureau, Gallatin Valley Farm Bureau, and Wayne County Farm Bureau; by protestants State of Illinois, Illinois

[2] The 5.36 miles of line between Station 319 + 13.7 and Station 36 + 56.2 omitted from the line abandonment is owned jointly by the B&O and Louisville and Nashville Railroad Company (L&N).

Commerce Commission, Thomas J. Duggan,[3] and J. Thomas McNeal[4]; and by protestants Shawneetown Regional Port District and B&O Concerned Citizens of Southern Illinois.

In F.D. No. 27506, the title proceeding, by application filed October 15, 1973, as amended, Prairie Trunk Railway (Prairie Trunk) of Joliet, Ill., a newly formed corporation organized for the purpose of acquiring and operating railroads, seeks authority pursuant to section 1(18) of the act to acquire and operate the line of railroad proposed for abandonment by B&O in F.D. No. 26965 (the Abandonment case) as well as to acquire through assignment the B&O interest in the 5.36-mile segment of line between Station 319 + 13.7 and Station 36 + 56.2 jointly owned and operated by B&O and L&N. In a separately submitted pleading expressing its support of the Prairie Trunk application B&O requests dismissal of the Abandonment case upon approval of the Prairie Trunk acquisition proposal. B&O further advised of its willingness to assume responsibility for and be subjected to the imposition of those conditions for the protection of adversely affected employees embodied in *Chicago, B. & Q. R. Abandonment*, 275 I.C.C. 700, (the *Burlington* conditions), as a condition of approval of the Prairie Trunk acquisition.

In F.D. No. 27507, by application filed October 15, 1973, concurrently with the application in F.D. No. 27506, Prairie Trunk seeks authority under section 20a of the act to issue 1 million shares of no-par-value common stock with a stated value of $1 per share and a secured 15-year promissory note[5] in principal amount not exceeding $650,000 bearing an annual interest rate 1 1/2 percent above the prevailing New York (Chase Manhattan Bank) prime interest rate from time to time in effect. These securities represent the initial capitalization of Prairie Trunk. Initially Prairie Truck proposes to issue 100,000 shares of the no-par common stock and the $650,000 promissory note to Trans-Action Associates, Incorporated (Trans-Action), of Joliet, Ill., for $750,000 in cash or equivalent assets. Upon the issuance of these securities, Prairie Trunk would become a wholly owned subsidiary of Trans-Action.[6]

[3] Illinois Legislative Director for the United Transportation Union (UTU).

[4] Indiana Legislative Director for UTU.

[5] Applicant's originally filed request to issue secured 5-year notes was apparently modified as reflected in oral testimony and a submitted exhibit to a proposed 15-year secured promissory note.

[6] Prairie Trunk the shell corporation, was, in fact, created by Trans-Action interests.

The applications in F.D. No. 27506 (the Acquisition case) and F.D. No. 27507 (the Securities case) were the subject of an oral hearing on a consolidated record held June 26 and 27, 1974, at Fairfield, Ill., before a second Administrative Law Judge not previously involved in the Abandonment case. By initial decision served June 10, 1975, the Administrative Law Judge approved the section 1(18) acquisition and operation proposed by Prairie Trunk in F.D. No. 27506 subject to (a) the subsequent approval by the Commission of an appropriate application under section 5(2) of the act by Trans-Action to control Prairie Trunk (b) the *Burlington* conditions for the protection of railway employees, the expense of which to be borne by the Chessie System (B&O), (c) the further condition that wages to be offered by Prairie Trunk for jobs formerly covered by union contract shall not be reduced below the level now in force under such contracts, (d) the submission of satisfactory proof of the Commission that the sum of $750,000 pledged to Prairie Trunk by Trans-Action has been reduced to cash and placed at the disposal of Prairie Trunk for the uses and purposes set forth in the application, and (e) the condition that for a period of 5 years from the consummation date of the acquisition, no abandonment application relating to the subject line of railroad may be filed by Prairie Trunk prior to a bona fide offer of resale to any party to the proceeding at a purchase price no less favorable than that approved for payment to B&O adjusted to Consumer Price Index changes. The request for dismissal of the Abandonment case was denied by the Administrative Law Judge as being a matter pending before the Commission and not properly before him. In F.D. No. 27507 the issuance of 1 million shares of common capital stock and secured notes not to exceed $650,000 in principal amount proposed by Prairie Trunk was authorized by the Administrative Law Judge.

Exceptions to the initial decision of the Administrative Law Judge served June 10, 1975, were filed by applicant Prairie Trunk, jointly by protestants Thomas J. Duggan and J. Thomas McNeal, and separately by protestant Illinois Commerce Commission. A joint reply to applicant's exceptions were filed by Thomas J. Duggan and J. Thomas McNeal. Applicant replied to protestants' exceptions, and B&O Concerned Citizens of Southern Illinois, intervener in support of the Prairie Trunk applications, replied to the exceptions of Illinois Commerce Commission.

In F.D. No. 27728, by application filed September 5, 1974, Trans-Action, a noncarrier holding company controlling Louisiana

Midland Railway Company (Louisiana Midland), a common carrier by railroad subject to part I of the act, as a wholly owned subsidiary, seeks authority under section 5(2) of the act to own and control more than one regulated common carrier by railroad, a condition which in view of Trans-Action's relationship with Prairie Trunk would be a resulting consequence of approval of the Acquisition and Securities cases. Protests were filed by the Railway Labor Executives' Association (RLEA), the Congress of Railway Unions (CRU), jointly by Thomas J. Duggan and J. Thomas McNeal (UTU), and jointly by the State of Illinois and the Illinois Commerce Commission (Illinois). RLEA and CRU expressed concern as to the possibility that approval of the application might have an adverse effect upon employees. Their protests were directed solely to this issue with both seeking the imposition of employee protective conditions in the event of approval of the application, RLEA seeking imposition of the conditions contained in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (the *New Orleans* conditions) and CRU seeking imposition of those contained in *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177 (the *Oklahoma* conditions).

By order of the Commission, Division 3, dated March 10, 1976, the proceeding in F.D. No. 27728 (the Control case) was set for handling under the modified procedure. The order raised serveral questions relating to the financial status of Trans-Action, the interest payment obligation to be imposed upon Prairie Trunk by its parent, the necessity for imposing labor protective conditions and if so the choice thereof, and indicated a need for more recent information as regards operations over the Flora-Shawneetown line. Pursuant to the March 10, 1976, order an initial statement under modified procedure containing a verification of the factual allegations made therein to the best of the knowledge and belief of the affiant[1] was submitted by Trans-Action. Protestants Illinois and UTU submitted a joint statement in reply to applicant's initial statement. A rebuttal statement containing a verification with an affirmative assertion of knowledge of the matters and things discussed therein on the part of the affiant as well as an assertion of the truth and correctness to the best of affiant's knowledge and belief of all previously submitted representations, attachments, and financial statements was filed by applicant.

[1]The verification was given by Craig E. Burroughs, president of Trans-Action as well as Prairie Trunk and Louisiana Midland.

A motion to strike certain portions of applicant's verified rebuttal statement was filed jointly by Illinois and UTU, and applicant replied thereto. Protestants contend that the portion of applicant's rebuttal verification which refers to previously submitted materials constitutes improper rebuttal. They assert that applicant's initial statement was improperly verified and that the entire statement should be considered as argument only. They further contend that as the exhibits attached to the rebuttal statement were not prepared by the affiant, they should be stricken as evidence. The language of the rebuttal verification to which protestants object was added by applicant to clarify its initial statement verification in response to the criticism of that verification contained in protestants' reply statement. We consider applicant's initial verification as clarified by its rebuttal verification to be in substantial compliance with rule 50 of the Commission's General Rules of Practice (49 CFR 1100.50), cf. *Pyramid Van Lines, Ext.—Elimination of Gateways*, 107 M.C.C. 812, 815. The objected-to exhibits represent a response to matters raised in protestants' reply statement and constitute proper rebuttal. In all respects the motion to strike is overruled.

Petitions for leave to intervene and to submit tendered statements in the Control case were filed jointly by Illinois Agricultural Association and its affiliates FS Service, Inc., Wabash Valley Service Company, White County Farm Bureau, Gallatin County Farm Bureau, and Wayne County Farm Bureau (IAA), and separately by Shawneetown Regional Port District (Port District). As petitioners are parties to the related Abandonment and Acquisition cases, their requests for intervention are granted and their tendered statements, IAA's statement of position and Port District's statement in support of applicant, are accepted for filing.

Exceptions to the Initial Decision in the Acquisition and Securities Cases

In its exceptions to the initial decision of the Administrative Law Judge in the Acquisition and Securities cases, Prairie Trunk objects to the imposition of the minimum wage condition for jobs formerly covered by union contract contending that the Commission lacks authority to prescribe or dictate wages in this manner and that the condition does violence to the Railway Labor Act (45 U.S.C. 151) and interferes with free collective bargaining. It notes that the wages of existing employees[8] affected by the transaction will be protected through the imposition of the *Burlington* conditions and that the

[8] Wages only to such employees as Prairie Trunk [illegible]

minimum wage condition to which it objects can only apply to employees to be recruited by Prairie Trunk subsequent to approval of the Acquisition case by the Commission. It further urges the inclusion of specific affirmative findings directing the continuation of existing through rates, routes, and divisions presently applicable to the subject line of railroad and authorizing the assumption by Prairie Trunk of all rights and obligations of B&O in the 5.36-mile segment of line owned jointly with L&N. Such findings it believes would insure stability and avoid ambiguity and controversy.

In reply UTU contends that the labor protective conditions imposed by the Administrative Law Judge are less than adequate and that adoption of Prairie Trunk's exceptions in this regard would be inequitable and unjust. It points out that UTU and other labor organizations have collective bargaining agreements with B&O covering employment on the involved line of railroad, that the proposed operations of Prairie Trunk would rely upon and be strongly integrated with B&O, and that Prairie Trunk has expressed its willingness to give preference in employment to present B&O employees. It asserts that in the exercise of its broad powers under section 1(18-20) of the act, the Commission clearly has authority to impose a maintenance-of-wage-levels condition as a condition for approval of a proposed acquisition. Further, it urges that Prairie Trunk be required to collectively bargain with representatives of the present employees working on the subject line of railroad. It expresses no objection to the imposition of the standard DT&I routing conditions requested by Prairie Trunk but contends that this demonstrates the true section 5(2) character of the proceeding. As to specific authorization for the assumption by Prairie Trunk of B&O's rights and obligations under its joint trackage agreement with L&N, protestant believes the participation of L&N is necessary for such a determination.

Illinois in its exceptions questions the financial ability of Prairie Trunk to maintain service on the Flora-Shawneetown line and requests the Commission to make positive findings as to the financial viability of Prairie Trunk's proposed operation. It further excepts to the environmental findings of the Administrative Law Judge to the effect that approval of the subject applications will not have a significant effect upon the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, contending that neither a negative Threshold Assessment Survey nor draft environmental impact statement were available at

the hearing, or within the required period prior thereto, and that Prairie Trunk's proposed operations will differ significantly from that presently being provided by B&O. In addition it raises certain procedural matters which will be discussed below.

UTU excepts generally to the approval of the subject applications urging that they be denied or dismissed. It challenges the legal premise accepted in the initial decision that a new carrier (Prairie Trunk) may under section 1(18) acquire and operate a line of railroad without the issuance pursuant to a section 1(18) application of a certificate of abandonment to the former operator (B&O), contending that the decision in *Cadillac & Lake City Ry. Co. Acquisition and Operation*, 320 I.C.C. 617, wherein the acquisition was approved and the abandonment dismissed, which was rendered by an employee board and relied upon by the Administrative Law Judge, was erroneous in its adoption of this practice and contrary to the manifest weight of Commission precedent, citing *Okmulgee Northern Ry. Co. Abandonment*, 320 I.C.C. 637, 638-40. It asserts that in approving the proposed acquisition the Administrative Law Judge misconceived the primary justification for the application to be cost reduction when in fact it is based upon a projected increase in traffic characterized as fantastic and not supported by the evidence. It contends that the capability of Prairie Trunk to render the proposed service has not been established. Protestant concurs and adopts the position of Illinois as regards the environmental findings. It asserts that as the proposed transaction constitutes an acquisition rather than an abandonment, should it be approved, the appropriate employee protective conditions to be imposed are the *New Orleans* conditions rather than *Burlington* conditions. It further requests that the Commission under its broad section 1(18) powers as a condition of approval require Prairie Trunk to collectively bargain with representatives of present employees of the line. The procedural matters discussed below raised by Illinois were also raised by this protestant.

In reply Prairie Trunk insists that the exceptions of protestants are without merit. It emphasizes public and shipper support for the proposed acquisition and notes the limited interest of protestants UTU and Illinois. It contends that there is nothing improper with the procedure utilized in *Cadillac & Lake City, supra*, and that its assumption of operations over the Flora-Shawneetown line precludes the occurence of any abandonment by B&O. It asserts that the viability of its financial position was adequately supported by

evidence of record unchallenged by protestants, and that the questioning of its traffic projections by protestants is inappropriate and inconsistent with their optimistic view of the line's traffic potential offered in the Abandonment case. It considers the environmental determination of the Administrative Law Judge to be both reasonable and correct in that the subject transaction involves the mere substitution of one carrier for another in the performance of operations over the same track. As to the labor protective conditions, it points out that the *Burlington* conditions imposed by the Administrative Law Judge are applicable to all employees involved in B&O operations on the Flora-Shawneetown line, that the *Burlington* conditions are similar to the other employee protective conditions sought by protestants, and that the benefit to be afforded affected employees through the imposition of standard employee protective conditions other than the *Burlington* conditions is not readily apparent.

B&O Concerned Citizens of Southern Illinois (Concerned Citizens) in reply to the exceptions of Illinois expresses its satisfaction with the manner in which the Administrative Law Judge dealt with the subject of applicant's financial viability and disposed of the environmental issue. As the Prairie Trunk proposal constitutes a continuation of existing railroad operations, it believes no further amplification is required of the environmental issue. It urges that the initial decision be affirmed.

Procedural matters raised on exceptions.—Protestants Illinois and UTU request the Commission to take official notice of the United States Railway Association (USRA) recommendation released June 23, 1975, to exclude the Flora-Shawneetown line (Trackage Coordination Project IL-5) from the Final System Plan containing the comment/reason that Illinois Central Gulf Railroad (ICG) is interested in acquiring the entire line and intends to deal directly with B&O and file a proposal with this Commission. Protestants urge that further action in the subject proceedings be deferred pending the filing of the ICG application. In reply, Prairie Trunk asserts that the comment/reason indicated for the USRA recommendation is based on speculation and misinformation. It notes that B&O has taken no action inconsistent with the proposed acquisition and has in fact reiterated its intention to sell the line to Prairie Trunk upon receipt of appropriate Commission authorization.* No such proposal

*Attached to the Prairie Trunk reply is a letter dated July 21, 1975, bearing the signature of the general attorney for B&O asserting that B&O has no plans or intentions of selling the subject line to ICG and confirming its intention to honor its agreement with Prairie Trunk.

has been submitted to the Commission by ICG as of this date, the absence of which relegates the matters sought to be officially noticed into the realm of pure speculation meriting no further discussion. The request for official notice is denied.

Protestants further seek the consolidation of the Acquisition and Securities cases with the Control and Abandonment cases as well as two other B&O abandonment applications, F.D. No. 26745, Baltimore & Ohio Railroad Company Abandonment Between Coal Shaft and Beardstown in Sangamon and Cass Counties, Illinois, and Docket No. AB-19 (Sub-No. 27), Baltimore & Ohio Railroad Company Abandonment Between Flora and Sangamon Junction in Clay, Effingham, Fayette, Shelby, Christian, and Sangamon Counties, Illinois. As previously indicated the first four proceedings to which protestants refer have herein been consolidated for disposition in a single report. The latter two abandonment applications involve connecting rail line segments northwest of Flora extending between Flora and Beardstown. Previous requests for consolidation of the three B&O abandonment applications in F.D. No. 26745, Docket No. AB-19 (Sub-No. 27), and F.D. No. 26965 independently raised in various proceedings have repeatedly been denied.[10] Protestants offer no substantial reasons as to why a reversal of the previous refusals to consolidate is in order. The request for consolidation of the three B&O abandonment applications is denied.

The Prior Administrative Law Judge Reports and the Prairie Trunk-Trans-Action Proposals

The facts set forth in the report of the Administrative Law Judge issued in the Abandonment case and the initial decision of the Administrative Law Judge issued in the Acquisition and Securities cases have been accurately stated in all material respects, and, as supplemented and expanded upon herein, are adopted as our own. To the extent facts are restated, we have deemed it necessary for clarity of discussion.

Pursuant to a Memorandum of Understanding dated July 25, 1973, Trans-Action and B&O have entered into an agreement whereby Trans-Action is to acquire the B&O line of railroad between Flora and Shawneetown as well as the entire B&O interest in the 5.36-mile segment of line between Junction and New Shawneetown which it owns jointly with L&N for the sum of $500,000. The $500,000 is to be payable in cash with $100,000 due upon receipt of approval by

[10] See report and recommended order of the Administrative Law Judge served February 14, 1973, in F.D. No. 26965; order of the Commission, Commissioner Tuggle, dated June 17, 1975, in all three proceedings; and the order of the Commission, Division 3, Acting as an Appellate Division, dated May 18, 1976, in F.D. No. 26745.

this Commission of the proposed acquisition and $400,000 to be paid upon commencement of operations over the newly acquired line or 180 days after final Commission authorization, whichever first occurs.

Trans-Action proposes to assign the assets and interest of B&O to be acquired plus $250,000 to Prairie Trunk in exchange for 100,000 shares of Prairie Trunk no-par-value common stock and a secured $650,000 promissory note to be issued pursuant to the Securities case. The principal amount of the promissory note would be payable in 15 years and bear interest at a per annum rate 1 1/2 percent above the prevailing New York (Chase Manhattan Bank) prime interest rate from time to time in effect with interest payable semiannually. The $250,000 is to provide Prairie Trunk with the necessary capital to meet projected start-up expenditure, equipment acquisition, construction, and working capital requirements. These requirements are identified as $20,000 for tools, shop machinery, and maintenance-of-way equipment; $15,000 for motor vehicles for agency, mechanical, and roadway maintenance forces (one mobile station van, two 1 1/2-ton pickup trucks, and one 2 1/2-ton Hi-rail truck); $6,000 for office furnishings and equipment; $20,000 for communications equipment; $89,000 for noninterchangeable freight equipment to service local movements; $5,000 for organizational expenses; and the balance of $95,000 for working capital purposes.[11] Trans-Action will also make available to Prairie Trunk assets in its possession such as 10 interchangeable 40-foot boxcars and various types of track materials when and as needed.[12]

The $750,000 required to finance the B&O acquisition and the initial Prairie Trunk capital will be generated by Trans-Action through the sale of steel rail and related materials inventories which are carried on the financial statements of Trans-Action at nominal values. As of April 19, 1976, negotiations were pending for the sale

[11] In the application as originally filed $60,000 was designated for the acquisition for three used locomotive units and $40,000 for the construction of shop and office facilities at Shawneetown. Trans-Action owns one locomotive unit which it will make available to its subsidiary and has access to other units which can be leased from Peabody Coal Company and B&O as needed. The contemplated shop and office facilities will not be needed initially. Shop space at the B&O diesel servicing facility at Flora will be available for heavy maintenance requirements.

[12] Trans-Action indicates that the use of these assets by Prairie Trunk as well as its use of the locomotive unit referred to in footnote 11 will not require an expenditure of cash on the part of Prairie Trunk. The locomotive will be considered as an additional capital contribution by Trans-Action for which additional shares of Prairie Trunk stock will be issued. The manner by which Trans-Action will be compensated for the use of the other assets, if such compensation is contemplated, was not indicated.

of approximately 2,059 tons of rail and rail fastenings, representing the balance of Trans-Action's unsold inventories of these items, which if successful would yield to Trans-Action approximately $900,000.

Trans-Action's balance sheet as of November 30, 1975, indicates total assets of $471,436, made up of current assets of $43,450; investments of $424,833, consisting of railroad equipment $6,825,[13] railroad real estate $14,508, capital stock of Great Plains Railway $3,000, and capital stock of Columbus & Greenville Railway $400,500[14]; and property and equipment (net) $3,153. Current liabilities totaling $154,514 include accrued wages of $48,475 and estimated income tax liability of $86,000; long-term liabilities representing loan from officer and accrued interest thereon amount to $21,601; while shareholders' equity consisting of capital stock of $3,200 and retained earnings of $292,121 totals $295,321. For the 6 months ended November 30, 1975, Trans-Action's gross income totaled $413,033, of which $406,333 represented the sale of rails. Net income for the period after provision for income taxes amounted to $294,340.

The railroad operation proposed by Prairie Trunk will be directed primarily at local shippers and the expansion, promotion, and development of rail movements local to the line. While as indicated in appendix A hereto the number of carloads handled by B&O over its Flora-Shawneetown branch for the years 1969 through 1975 has with the exception of 1970 trended downward with consistency, because the emphasis of its locally based short-line railroad service will be upon local shippers and local transportation needs, Prairie Trunk anticipates an immediate and dramatic expansion in the volume of traffic to be moved over the subject line. Prairie Trunk's projections as to traffic volume and gross operating revenues are set forth in appendix B. Traffic volume projections are broken down by commodities. For comparative purposes appendix B also contains a commodity breakdown of the traffic handled by B&O for the years 1969, 1970, and 1971. Based on these traffic estimates Prairie Trunk anticipates profitable operations within 2 years of the institution of

[13] Includes rail and track fastenings valued on the books at $1.

[14] Represents cost of 200,250 shares of common stock at $2 per share. Of these, 125,000 were held in a voting trust and offered for sale to local investors in Mississippi at $2 per share. By February 22, 1976, sale of the 125,000 shares was completed and the proceeds turned over to Trans-Action.

Trans-Action's investment in the capital stock of Louisiana Midland Railway being carried on the equity method is valued at zero as of the balance sheet date.

its service. Its financial projections are outlined in the *pro forma* income statement set forth in appendix C.

Trans-Action's objective in its control and operation of Prairie Trunk will not be to accumulate and distribute short-term profits but rather to enhance the asset value of its subsidiary through the development of a responsible and enduring service-oriented short-line railroad.

Position of Protestants and Other Parties

Illinois.—Protestant vigorously opposes the Abandonment case for the reasons set forth in the February 14, 1973, report and recommended order of the Administrative Law Judge, particularly the strong public need for continued rail service on the Flora-Shawneetown line and the potential for substantial increases in traffic that exists along the line. It opposes the Acquisition and Control cases because it considers Trans-Action and Prairie Trunk to be in a financially weak position and not entirely capable of providing the rail service required on the line. Protestant indicated its support for the acquisition of the Flora-Shawneetown line by another rail carrier not a party to these proceedings.

UTU.—UTU opposes the Abandonment case for the same reasons indicated by Illinois. For similar reasons it also opposes the Acquisition and Control cases. Protestant questions the reliability of the Prairie Trunk traffic projections as well as applicant's ability to perform the rail service it proposes. UTU considers the *Burlington* conditions inappropriate for protecting the interests of employees in the pending proceedings.

Concerned Citizens.—Concerned Citizens, a group of approximately 100 shippers and consignees located in communities on the Flora-Shawneetown line, actively opposes the Abandonment case but supports the acquisition and operation of the subject line by any qualified and responsible railroad. It supports the proposed Prairie Trunk acquisition as the best available alternative for the improvement of a needed rail service essential to the economic maintenance and development of its area. It considers the financial conditions imposed by the Administrative Law Judge in the initial decision of June 10, 1975, adequate to insure the financial viability of the proposed Prairie Trunk operation.

IAA.—These affiliated farm service organizations representing farmer members located in southern Illinois vigorously oppose the Abandonment case. Because of the failure of B&O to provide

adequate car service and track maintenance on the subject line, IAA reluctantly supported the Acquisition case proposals. It is particularly anxious that its members are assured of a reliable rail transportation service rendered by a financially responsible carrier. Based on information contained in the joint reply statement submitted by Illinois and UTU in the Control case, IAA is no longer satisfied that Trans-Action is responsible either financially or otherwise to insure that adequate rail transportation service will be available to its members. For this reason it opposes Trans-Action's application for control and no longer supports the proposed acquisition.

Port District.—This operator of a public port facility on the Ohio River at Shawneetown stands in opposition to the Abandonment case but fully supports the Acquisition and Control cases. It considers the proposed short-line railroad to be the last hope for regular and dependable rail service for shippers and receivers in its region. It is aware of and has identified several new development projects at its port facility which will require the availability of adequate rail service.

Discussion and Conclusions

At the outset, we take cognizance of the fact that while consummation of the Louisiana Midland rail line acquisition[18] occurred on April 28, 1974, some 2 months prior to the oral hearing in the Acquisition and Securities cases and some 4 months prior to the formal filing of the Control case herein under consideration, the parent-subsidiary relationship between Trans-Action and Louisiana Midland and Trans-Action and Prairie Trunk was fully disclosed at the oral hearing and the subject of careful and intensive examination. Indeed the condition imposed by the Administrative Law Judge in the initial decision served June 10, 1975, requiring Trans-Action to file and subsequently secure Commission approval of the common control relationship which would result from approval of the Prairie Trunk acquisition proposal reflected a formalization of Trans-Action's clearly expressed intent in this regard. Although Louisiana Midland is currently engaged in the

[18]This transaction was approved in F.D. No. 27450, *Louisiana Midland Railway Company—Acquisition and Operation of Line of Railroad in Winn, Grant, LaSalle, Catahoula, and Concordia Parishes, Louisiana* (not printed), decided March 13, 1974, by the Commission, Review Board Number 5, wherein Louisiana Midland was authorized to acquire a described line of railroad from Illinois Central Gulf Railroad Company.

performance of a short-line rail transportation service similar in terms of physical operation to the type of short-line railroad operation herein proposed by Prairie Trunk, the 76-mile line of railroad between Packton and Vidalia, La., located in the northeast portion of central Louisiana over which it operates is separated geographically from the southeastern Illinois line of railroad and area of service identified with the proposed Prairie Trunk operation by well in excess of 500 miles. Assuming that approval of the proposed Prairie Trunk acquisition is justifiable, the two railroad operations are so clearly separate and unrelated as to merit our concluding that common ownership and control of Louisiana Midland and Prairie Trunk by Trans-Action will have no adverse competitive effect upon the utilizers of their respective services.

In our consideration of the Prairie Trunk acquisition proposal and its impact upon the interest of the public, two principal questions have been raised. First, accepting the fact that Prairie Trunk and its parent are sincere in their desire to improve and expand rail service on the subject line, is Prairie Trunk capable in terms of operating competence and financial ability of fulfilling its objectives or at a minimum of insuring the continued availability of adequate rail service on the line? Second, if the undertaking of this endeavor is within the capability of Prairie Trunk, whether the conditions imposed by the Administrative Law Judge in his initial decision served June 10, 1975, for the protection of railroad employees affected by the acquisition should be modified?

Confronted by the consistent erosion in the volume of traffic handled by B&O on its Flora-Shawneetown line, the repetitious shipper complains as to the steady deterioration of service on the line, the negative approach taken by B&O in its operation of the line as reflected by weak and ineffective attempts to develop traffic and a persistency of effort to end its operating responsibility for the line either through abandonment or sale, it is quite evident that the service envisioned by the Prairie Trunk proposal would be a significant improvement over that presently available on the line and of substantial benefit to shippers in the area. Clearly, if Prairie Trunk though initially dependent upon Trans-Action for managerial direction and financial resources is able to function in its own capacity as an independent entity and a financially responsible short-line railroad, the best interest of the public would be served by approval of the proposed acquisition.

Trans-Action is a transportation consulting firm specializing in light-density rail line problems. Since its organization in May 1971,[16] it has been engaged in the development of short-line feasibility studies (including engineering reports), the financing of new railroad ventures, and, in the course of assisting interested parties involved in transportation regulatory matters, in the preparation of pleadings, analyses, and testimony. It has functioned as a consultant and provided complete organization and management services for a variety of short-line railroads. In view of this background, particularly that relating to the organization and operation of short-line railroads, we are satisfied that Trans-Action possesses the experience and knowledge required to provide Prairie Trunk with the kind of responsible leadership and management necessary to undertake and successfully pursue the short-line railroad operation proposed herein. Cf. *Cambria & I. R. Co. Control*, 275 I.C.C. 360, 365.

The real applicant in the acquisition proceeding is Trans-Action.[17] It proposes to utilize as the vehicle through which it will own and operate the line of railroad to be acquired a newly created wholly owned subsidiary. We recognize, however, that the subsidiary, Prairie Trunk, represents an independent corporate entity separate and distinct from Trans-Action. It is particularly for this reason that Trans-Action has an obligation to the shipping public served by the subject line to insure that its subsidiary is adequately capitalized and financially independent.

Trans-Action has indicated that its interest in the Flora-Shawneetown line is not for short-term profits but rather for the preservation, enhancement, and long-term development of a responsible public service corporation in the short-line railroad field. To finance this undertaking Trans-Action proposes to provide Prairie Trunk with the equivalent of $750,000 in assets and cash to underwrite Prairie Trunk's anticipated capital and operating funding requirements, with the understanding that additional resources will

[16]Trans-Action was incorporated under the laws of Illinois on May 28, 1971, as Faburr Fund, Inc. Its present name was adopted by charter amendment filed January 10, 1973.

[17]The agreement to acquire the B&O Flora-Shawneetown branch is between Trans-Action and B&O. Prairie Trunk is not a party to that agreement, but through assignment from Trans-Action will acquire the rail line in exchange for securities. While the authority requested in the Acquisition case is technically inaccurate, corrective action need not be taken as the intent of the acquisition proposal is clear.

be made available if needed. From the financial information submitted in these proceedings, we are satisfied that Trans-Action is in a position to provide Prairie Trunk with this initially suggested $750,000 funding requirement.

Unfortunately as proposed in the Securities case the financing of Prairie Trunk will consist of $100,000 in equity capital and $650,000 in secured interest-bearing debt. Such a financial arrangement is hardly reassuring, for it imposes serious limitations upon the financial independence of Prairie Trunk as a separate corporate entity and subjects its rail operation to an unnecessary interest expense burden. In the face of the speculative uncertainties inherent in the optimistic traffic projects of Prairie Trunk, and, as suggested by the evidence presented in the Abandonment case, the potential necessity to incur substantial expenditures for rehabilitation and maintenance of the line, it is particularly important that the fledging Prairie Trunk operation be financially flexible.

To provide Prairie Trunk with an acceptable degree of financial flexibility and independence, it is necessary that its initial capital structure be simplified by eliminating the $650,000 debt proposal and requring an equity investment by Trans-Action in the common stock of Prairie Trunk of $750,000. Elimination of the $650,000 promissory note, which was to be secured by all of the physical property transferred by Trans-Action to Prairie Trunk, will have a twofold effect. First, it will provide Prairie Trunk with a collection of assets totally unencumbered by debt representing a resource by reason of which additional financing, when and if required, from parties other than Trans-Action may be secured. Second, it will remove a $65,000 annual interest expense burden,[18] an amount representing approximately 15 percent of the projected expenses estimated by Prairie Trunk for its first year of operation. Notwithstanding the fact that interest payments due its parent corporation could readily be deferred by Prairie Trunk, the expense represents a legally enforceable legitimate charge against income and imposes an unnecessary burden and needless obstacle to the financial health of the Prairie Trunk rail operation.

While recognizing the Prairie Trunk proposal to be an attempt to upgrade the level of service available on the Flora-Shawneetown line, an effort which should be encouraged, we are fully aware of the many uncertainties which surround the projected operation. We are

[18]Based on Prairie Trunk's pro forma income statement projection.

also aware that the liquidation value of the steel rail and other assets to be acquired by Prairie Trunk far exceeds the $500,000 purchase price. The shipping public has a decided interest in the continuation of a Flora-Shawneetown rail service and should be afforded some measure of assurance that future rail service on the line will not be jeopardized because of an irresponsible or underfinanced ownership or a lack of sincerity or commitment on the part of the new operators. The broadening of Prairie Trunk's equity capital base will enhance its financial stability and independence providing it with a measure of insulation from the activities of its parent. To avoid the temptation of a handsome profit through abandonment and liquidation, we will retain the 5-year condition imposed by the Administrative Law Judge in the initial decision served June 10, 1975, which preempts the filing of an abandonment application prior to a bona fide offer of resale to any party herein. As a caveat to Prairie Trunk and its parent, we will not look with favor upon any future abandonment proposal which may result in a substantial profit arising out of the liquidated scrap value of the line, particularly if the public demonstrates an active interest in continued rail service.

While UTU questions the technical propriety of the manner in which the Administrative Law Judge disposed of the Acquisition case, it is clear that the issues raised—i.e., (1) that an abandonment must be authorized before an acquisition can be approved, and (2) that the proposed transaction is subject to section 5(2) of the act rather than section 1(18)—are actually directed at the employee protection issue, specifically the nature and extent to which conditions for the protection of employees should be imposed. Pursuant to section 5(2)(f)[19] the imposition by the Commission of employee protective conditions is mandatory in a section 5(2) transaction, whereas in a section 1(18) proceeding the imposition of such conditions is solely within the discretion of the Commission. See *Interstate Commerce Commission* v. *R. Labor Executives Assn.*, 315 U.S. 373 (1942).

[19]Section 5(2)(f) states:

As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment ***.

Section 5(2)(a) vests jurisdiction in the Commission to authorize:

***any carrier, or two or more carriers jointly, to purchase *** the properties, or any part thereof, of another [carrier] ***.

On the other hand section 1(18) provides in part:

***no carrier by railroad subject to this part *** shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the *** operation *** of such additional or extended line of railroad ***.

Conceivably, although not specifically asserted by UTU, the failure of the Administrative Law Judge to formally approve the B&O abandonment application lends credence to the contention that the subject proceeding deals with a 5(2)(a) purchase application rather than a 1(18) application to acquire and operate, the latter apparently being dependent upon a prior or simultaneously approved abandonment. As a section 5(2) transaction the requirements of 5(2)(f) mandating the imposition of employee protective conditions would be applicable. Contrary to the contention of UTU, abandonment authorization is not an essential prerequisite to approval of a 1(18) acquisition or operation proposal, although a close relationship between these types of proceedings is clearly recognizable. See in addition to *Cadillac & Lake City Co. Ry. Co. Acquisition and Operation, supra*, to which UTU takes strong exception, *Iowa Term. R. Co. Acquisition and Operation*, 312 I.C.C. 546, in which a 1(18) acquisition was approved without even the filing of a related abandonment application.

Further, while on the basis of the statutory language it is understandable that a degree of confusion exists as to whether section 1(18) or 5(2) applies to the proposed acquisition, a distinction between the types of proceedings to which the respective provisions are applicable has been recognized. On the basis of congressional intent we have found section 5(2) to be the appropriate provision for dealing with the unification of existing railroad enterprises, as in the case of consolidation or merger. *Okmulgee Northern Ry. Co. Abandonment, supra*, 639-640; see also *Tennessee Central Ry. Co. Abandonment*, 334 I.C.C. 235, 245; and *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 331 I.C.C.

151, 156-157. Section 1(18), on the other hand, is intended to deal with the abandonment, acquisition, and extension of an individual line of railroad and is essentially directed at the transportation-oriented activities of a single rail carrier or applicant; cf. *Okmulgee Northern Ry. Co. Abandonment, supra*, 639-640; and *Iowa Term. R. Co. Acquisition and Operation, supra*, 548-549. In its present condition Prairie Trunk stands as a noncarrier seeking to acquire a line of railroad. As a noncarrier[10] it is not subject to section 5(2) and is only subject to 1(18) inasmuch as, upon approval of the acquisition, it proposes to conduct operations over the Flora-Shawneetown line. *Iowa Term R. Co. Acquisition and Operation, supra*, 548-549. The proposed acquisition does not contemplate merger or unification of existing rail enterprises, but rather is concerned with the simple acquisition of a line by a prospective new rail carrier. We are satisfied that section 1(18) rather than section 5(2) is the most appropriate provision to deal with the type of transaction herein pending.

When in the exercise of our discretion in dealing with a section 1(18) application we have concluded that protection should be afforded employees adversely affected by the proposal, it has been our practice to impose the *Burlington* conditions. Notwithstanding the unsuccessful effort of UTU to subject the proposed Flora-Shawneetown line acquisition to the requirements of section 5(2)(f), we feel constrained to recognize that the protections afforded adversely affected employees under the *Burlington* conditions do in fact satisfy the statutory requirements of section 5(2)(f) no less than do the *Oklahoma* or *New Orleans* conditions which are normally imposed in a 5(2) proceeding.[11] Indeed considerable similarity between the *Burlington*, *Oklahoma*, and *New Orleans* conditions exists, with the *Burlington* conditions being directed at a single, individual rail carrier whose employees may be adversely affected by approval of a proposed transaction whereas the *Oklahoma* and *New Orleans* conditions are directed at several rail carriers whose employees could be so affected.

As Prairie Trunk is not yet an operating organization and currently employs no personnel and as Trans-Action being a

[10] Trans-Action as a holding company is also a noncarrier and, accordingly, is not subject to 1(18) or 5(2) as a carrier by railroad. It is, however, subject to 5(2) by virtue of its holding company status.

[11] See particularly *Burlington* conditions (1) and (2) which provide wage guarantee protections for a period of 4 years from the effective date of the Commission's order, *Chicago, B. & Q. R. Co. Abandonment, supra*, 704-705.

noncarrier holding company is not engaged in operations as a common carrier by railroad, the only employees who might be adversely affected by our approval of the proposed acquisition are those presently in the employ of B&O, particularly those currently engaged in the operation of its Flora-Shawneetown branch. B&O has expressed its willingness to assume the responsbilities imposed by the *Burlington* conditions in the event of approval of the proposed acquisition. The Administrative Law Judge in his initial decision of June 10, 1975, imposed the *Burlington* conditions as a condition of his approval of the transaction, the expenses of which to be borne by B&O. While UTU expresses dissatisfication with the *Burlington* conditions, revealing a preference for the *New Orleans* conditions, it failed to indicate wherein the *Burlington* conditions are inadequate as opposed to the *New Orleans* conditions or to specify why under the circumstances here present *New Orleans* would be more appropriate than *Burlington* for the subject transaction. We believe that the interests of employees who may be affected by the proposed transaction should be protected and that imposition of the *Burlington* conditions upon B&O in the manner directed by the Administrative Law Judge is the appropriate means by which to protect those interests. From a financial point of view the immediate and principal beneficiary of the proposed acquisition is B&O. The only employees who can be adversely affected by the transaction are those presently employed by B&O. The *Burlington* conditions provide fair and reasonable protections, and B&O is more than able to carry the potential costs of employee protection.

With regard to the maintenance-of-way-levels condition adopted by the Administrative Law Judge and the mandatory collective bargaining directive requested by UTU, both of which would be imposed upon Prairie Trunk, we believe that Prairie Trunk as a new operator should not be encumbered with Commission-imposed conditions in its initial dealings with its employees. Such conditions would subject Prairie Trunk to inequitable and unduly limiting standards which are particularly unnecessary when we consider that those employees who might be adversely affected by the transaction are adequately protected by standard employee protective conditions imposed upon and willingly assumed by a financially secure rail carrier. Accordingly, the maintenance-of-wage-levels condition will be removed and the mandatory collective bargaining directive will not be imposed.

The specific affirmative findings requested by Prairie Trunk to insure stability and avoid controversey merit some comment. To

direct a continuation of existing through rates, routes, and divisions presently applicable to the Flora-Shawneetown line would require that those participating in the existing through rates, routes, and divisions be parties to the proceeding. This type of condition is similar to those described in *Detroit, T. & I. R. Co. Control*, 275 I.C.C. 455, 492-493, (DT&I conditions) which are usually imposed upon an applicant at the behest of other carriers who fear possible adverse effects from the transaction, cf. *Spokane International R. Co. Control*, 295 I.C.C. 425, 434-436. The only carrier party to these proceedings is B&O whose obligations with regard to through rates, routes, and divisions constitute an integral part of its agreement with Trans-Action. The sole request for affirmative findings on this subject was made by applicant Prairie Trunk. They can have applicability only to B&O. In the face of B&O's contractual obligations, the requested affirmative findings would appear to be unnecessary and the possible source of confusion and controversy. They will not be entered.

Authorization for the assumption of all rights and obligations of B&O under its joint trackage agreement with L&N is inherent in our approval of the B&O assignment of its interest in the 5.36-mile segment of line owned jointly with L&N to Prairie Trunk.

We find no merit to protestants' objections to the positive environmental findings of the Administrative Law Judge in the initial decision of June 10, 1975. The proposed acquisition and the several other proceedings here under consideration contemplate a continuation of rail service over the same trackage. Hence our decision herein can properly be characterized as not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

The Control case.—As is clearly inferred from our previous discussion, we find that the control relationship contemplated between Trans-Action and Prairie Trunk and, in view of Trans-Action's control of Louisiana Midland, the control by Trans-Action of more than one common carrier by railroad will be consistent with the public interest. Although Trans-Action is a holding company, its economic activities are exclusively oriented toward railroad transportation. But for the fact that it is a separate corporate entity possessed of holding company status, Trans-Action would be subject to our jurisdiction as a common carrier by railroad. Under these circumstances and in view of the authorization herein for it to control two common carriers by railroad, we believe that Trans-

Action should be subjected to the full impact of section 5(4)[22] of the act. Accordingly, pursuant to section 5(4) and as a condition of our approval of the control application, Trans-Action shall be considered a common carrier by railroad subject to sections 20(1) to (10) (which relate to reporting and accounting requirements) and 20a(2) to (11) (which relate to the issue of securities and the assumption of liabilities) of the act.

The Abandonment case.—In view of the B&O request for dismissal of its abandonment application in the event of a positive disposition of the Prairie Trunk acquisition proposal, our consideration of issues raised in the abandonment proceeding has been minimal. Nevertheless, we feel constrained to point out that the substance of the acquisition proposal is in direct conflict with the theory upon which the abandonment application is based and that in the face of the very real potential for traffic development on the Flora-Shawneetown line emphasized in the acquisition proceeding it would be extremely difficult for us to approve the abandonment proposal. Rather than proceed further in an analysis of the abandonment proposal, we will comply with B&O's request and dismiss its application for abandonment.

Ultimate Findings

In Finance Docket No. 27506, we find that subject to (1) the conditions for the protection of employees embodied in *Chicago, B. & Q. R. Abandonment*, 257 I.C.C. 700, responsibility and cost for which to be borne by the Baltimore & Ohio Railroad Company, (2) the placing by Trans-Action Associates, Incorporated, at the dipsosal of Prairie Trunk Railway of the sum of $750,000 in cash or equivalent assets to be used for the purposes set forth in the application, and (3) the condition that for a period of 5 years from the date of consummation of the acquisition herein authorized, no abandonment application relating to the subject line of railroad may be filed by Prairie Trunk Railway prior to a bona fide offer of resale to any party to this proceeding at a purchase price no less favorable than the $500,000 to be paid to the Baltimore & Ohio Railroad Company for the acquisition, adjusted to Consumer Price Index changes, the present and future public convenience and necessity require the acquisition and operation by Prairie Trunk Railway of the line of railroad between Flora and Shawneetown, Ill., described

[22] Formerly section 5(3). Redesignated as section 5(4) pursuant to section 403(a) of the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210, 90 Stat. 63.

herein, including all of the B&O interest in the 5.36-mile segment of line between Junction and New Shawneetown, Ill., jointly owned and operated by B&O and L&N.

In Finance Docket No. 27507, we find that the issuance by Prairie Trunk Railway of not exceeding 750,000 shares of no-par-value common stock with a stated value of $1 per share to Trans-Action Associates, Incorporated, for the purpose of financing the acquisition and operation of the line of railroad authorized to be acquired in F.D. No. 27506, (a) is for a lawful object within its corporate purposes and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purposes; but that in all other respects, the application should be denied.

In Finance Docket No. 27728, we find that the acquisition by Trans-Action Associates, Incorporated, of control of Prairie Trunk Railway upon the terms set forth and approved in F.D. No. 27506 and F.D. No. 27507, and subject to all of the conditions imposed therein, constitutes a transaction within the scope of section 5(2)(a) of the act, and will be consistent with the public interest; that this acquisition of control and Trans-Action's continued maintenance of control of Louisiana Midland Railway Company will be consistent with the public interest; and that if the transaction is consummated Trans-Action shall be considered a carrier by railroad within the meaning of section 5(4) of the act subject to the provisions of section 20(1) to (10), inclusive (relating to reporting and accounting), and section 201(2) to (11), inclusive (relating to the issuance of securities and the assumption of liabilities), of the act.

In Finance Docket No. 26965, we find that the application for abandonment should be dismissed.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate certificate and order will be entered.

APPENDIX A

Traffic handled by B&O over its Flora-Shawneetown Branch 1969-1975

Year	Number of carloads	Total tonnage	B&O revenues
1969	1,707	106,103	$392,977
1970	2,081	146,975	540,185
1971	1,705	111,899	478,149
1972	1,304	85,519	431,000
1973	1,162	74,306	505,000
1974	933	64,987	479,000
1975	876	65,236	548,000

APPENDIX B

Prairie Trunk projections as to traffic volume and gross freight revenues on the Flora-Shawneetown line

Type of traffic	Estimated freight carloadings by year						Carloads handled by B&O 1969-1971		
	Year 1	Year 2	Year 3	Year 4	Year 5	Future years	1969	1970	1971
Grain (farm products)	2,500	2,600	2,700	2,800	2,900	2,900	741	1,074	604
Sand and gravel	1,500	1,750	2,000	2,250	2,500	3,000	.....	.....	.....
Fluorspar	475	475	475	475	475	475	439	580	591
Fertilizers	250	250	250	250	250	250	240	241	263
Coal	.....	450	900	1,000	1,000	1,000	.....	.....	.....
Miscellaneous	200	200	200	200	200	200	287	186	247
Overhead	350	350	350	350	350	350	(1)	(1)	(1)
Total carloads	5,275	6,075	6,875	7,325	7,675	8,175	1,707	2,081	1,705

[1]Included within the other carload categories indicated.

APPENDIX B—Continued

Estimated gross freight revenues by year
(000's omitted)

Type of traffic	Year 1	Year 2	Year 3	Year 4	Year 5	Future years
Grain	$205	$213	$221	$230	$238	$238
Sand and gravel	90	105	120	135	150	180
Fluorspar	59	59	59	59	59	59
Fertilizers	25	25	25	25	25	25
Coal	.....	45	90	100	100	100
Miscellaneous	20	20	20	20	20	20
Overhead	21	21	21	21	21	21
Switching and demurrage	10	10	10	10	10	10
Total	430	498	566	600	623	653

APPENDIX C

Prairie Trunk projected pro forma income statement
(000's omitted)

	Year 1	Year 2	Year 3	Year 4	Year 5	Future years
Gross revenues[1]	$445	$514	$583	$618	$641	$673
Railway operating expenses	322	344	406	425	430	431
Net railway operating revenues	123	170	177	193	211	242
Net rents, taxes, and fixed charges	131	134	137	139	142	149
Net railway operating income (loss)	(8)	36	40	54	69	93

[1]Including interest, rentals, and miscellaneous.

CERTIFICATE AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D.C., on the 17th day of February 1977.

FINANCE DOCKET NO. 27506

PRAIRIE TRUNK RAILWAY—ACQUISITION AND OPERATION—BETWEEN FLORA AND SHAWNEETOWN IN CLAY, WAYNE, WHITE, AND GALLATIN COUNTIES, ILL.

FINANCE DOCKET NO. 27507

PRAIRIE TRUNK RAILWAY SECURITIES

FINANCE DOCKET NO. 27728

TRANS-ACTION ASSOCIATES, INCORPORATED—CONTROL—PRAIRIE TRUNK RAILWAY

FINANCE DOCKET NO. 26965

BALTIMORE & OHIO RAILROAD COMPANY ABANDONMENT BETWEEN RINARD AND SHAWNEETOWN, IN CLAY, WAYNE, WHITE, AND GALLATIN COUNTIES, ILLINOIS

Investigation of the matters and things involved in these proceedings having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report together with the report of the Administrative Law Judge in Finance Docket No. 26965 and the initial decision of the Administrative Law Judge in Finance Dockets Nos. 27506 and 27507 are referred to and hereby made a part hereof:

It is hereby certified, in Finance Docket No. 27506, that subject to the conditions stated in the report, the present and future public convenience and necessity require the acquisition and operation by Prairie Trunk Railway of a line of railroad between Flora and Shawneetown, Ill., as described in the report, including the assignment of interest in the 5.36-mile segment of line between Junction and New Shawneetown, Ill.

It is ordered, in Finance Docket No. 27507, that Prairie Trunk Railway be, and it is hereby, authorized to issue not exceeding 750,000 shares of its no-par-value common stock with a stated value of $1 per share to Trans-Action Associates, Incorporated, for the purposes and on the terms hereinbefore stated, and that in all other respects the application be, and it is hereby, denied.

It is further ordered, in Finance Docket No. 27728, that the acquisition by Trans-Action Associates, Incorporated, of control of Prairie Trunk Railway upon the terms and conditions set forth in the report, and the control by Trans-Action Associates,

Incorporated, of Prairie Trunk Railway and Louisiana Midland Railway Company, two common carriers by railroad, be, and they are hereby, approved and authorized.

It is further ordered, That Trans-Action Associates, Incorporated, concurrently with consummation of the transactions herein authorized, pursuant to section 5(4) of the Interstate Commerce Act, shall be considered a carrier by railroad subject to section 20(1) to (10), inclusive, and section 20a(2) to (11), inclusive, of the Interstate Commerce Act.

It is further ordered, in Finance Docket No. 26965, that the application be, and it is hereby, dismissed.

It is further ordered, That this certificate and order shall take effect and be in force from and after 35 days from its date of service.

It is further ordered, That Prairie Trunk Railway, when filing schedules establishing rates and charges applicable to the line, shall in such schedules refer to this certificate and order by date and docket number.

It is further ordered, That, except as herein authorized, the aforesaid stock shall not be sold, pledged, repledged, or otherwise disposed of by Prairie Trunk Railway unless or until so ordered or approved by this Commission.

It is further ordered, That nothing herein shall be construed to imply any guarantee or obligation as to said stock, or dividends thereon, on the part of the United States.

It is further ordered, That Prairie Trunk Railway shall report concerning the matters herein involved in conformity with the order of the Commission, by division 3, dated May 20, 1964, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 CFR 1115.6).

It is further ordered, That, if the acquisition authority herein granted to Prairie Trunk Railway is exercised, applicants shall submit for the consideration of this Commission three copies of the journal entries required to record the transaction, and confirm in writing, to the Commission, immediately after consummation, the date on which consummation has actually taken place.

It is further ordered, That pursuant to section 20a(3) of the act, the Commission may, from time to time, for good cause shown, make such supplemental orders herein as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so authorized or the proceeds thereof may be applied.

And it is further ordered, That unless the transactions herein authorized are consummated within 180 days from the date hereof, this certificate and order as it applies to Finance Docket No. 27506, Finance Docket No. 27507, and Finance Docket No. 27728 shall be of no further force and effect.

By the Commission, Division 3.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX J

Interstate Commerce Act

SECTION 1a. (1) No carrier by railroad subject to this part shall abandon all or any portion of any of its lines of railroad (hereafter in this section referred to as 'abandonment') and no such carrier shall discontinue the operation of all rail service over all or any portion of any such line (hereafter referred to as "discontinuance"), unless such abandonment or discontinuance is described in and covered by a certificate which is issued by the Commission and which declares that the present or future public convenience and necessity require or permit such abandonment or discontinuance. An application for such a certificate shall be submitted to the Commission, together with a notice of intent to abandon or discontinue, not less than 60 days prior to the proposed effective date of such abandonment or discontinuance, and shall be in accordance with such rules and regulations as to form, manner, content, and documentation as the Commission may from time to time prescribe. Abandonments and discontinuances shall be governed by the provisions of this section or by the provisions of any other applicable Federal statute, notwithstanding any inconsistent or contrary provision in any State law or constitution, or any decision, order, or procedure of any State administrative or judicial body. The authority granted to the Commission under this section shall not apply to (a) abandonment or discontinuance with respect to spur, industrial, team, switching, or side tracks if such tracks are located entirely within one State, or (b) any street, suburban, or interurban electric railway which is not operated as part of a general system of rail transportation.

(2)(a) Whenever a carrier submits to the Commission a notice of intent to abandon or discontinue, pursuant to paragraph (1), such carrier shall attach thereto an affidavit cer-

tifying that a copy of such notice (i) has been sent by certified mail to the chief executive officer of each State that would be directly affected by such abandonment or discontinuance, (ii) has been posted in each terminal and station on any line of railroad proposed to be so abandoned or discontinued, (iii) has been published for 3 consecutive weeks in a newspaper of general circulation in each county in which all or any part of such line of railroad is located, and (iv) has been mailed, to the extent practicable, to all shippers who have made significant use (as determined by the Commission in its discretion) of such line of railroad during the 12 months preceding such submission.

(b) The notice required under subdivision (a) shall include (i) an accurate and understandable summary of the carrier's application for a certificate of abandonment or discontinuance, together with the reasons therefor, and (ii) a statement indicating that each interested person is entitled to recommend to the Commission that it approve, disapprove, or take any other specified action with respect to such application.

(3) During the 60-day period between the submission of a completed application for a certificate of abandonment or discontinuance pursuant to paragraph (1) and the proposed effective date of an abandonment or discontinuance, the Commission shall, upon petition, or may, upon its own initiative, cause an investigation to be conducted to assist it in determining what disposition to make of such application. An order to the Commission to implement the preceding sentence must be issued and served upon any affected carrier not less than 5 days prior to the end of such 60-day period. If no such investigation is ordered, the Commission shall issue such a certificate, in accordance with this section, at the

end of such 60-day period. If such an investigation is ordered, the Commission shall order a postponement, in whole or in part, in the proposed effective date of the abandonment or discontinuance. Such postponement shall be for such reasonable period of time as is necessary to complete such investigation. Such an investigation may include, but need not be limited to, public hearings at any location reasonably adjacent to the line of railroad involved in the abandonment or discontinuance application, pursuant to rules and regulations of the Commission. Such a hearing may be held upon the request of any interested party or upon the Commission's own initiative. The burden of proof as to public convenience and necessity shall be upon the applicant for a certificate of abandonment or discontinuance.

(4) The Commission shall, upon an order with respect to each application for a certificate of abandonment or discontinuance—

(a) issue such certificate in the form requested by the applicant if it finds that such abandonment or discontinuance is consistent with the public convenience and necessity. In determining whether the proposed abandonment is consistent with the public convenience and necessity, the Commission shall consider whether there will be a serious adverse impact on rural and community development by such abandonment or discontinuance;

(b) issue such certificate with modifications in such form and subject to such terms and conditions as are required, in the judgment of the Commission, by the public convenience and necessity; or

(c) refuse to issue such certificate.

Each such certificate which is issued by the Commission shall contain provisions for the protection of the interests of

employees. Such provisions shall be at least as beneficial to such interests as provisions established pursuant to section 5(2)(f) of this Act and pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565). If such certificate is issued without an investigation pursuant to paragraph (3) of this section, actual abandonment or discontinuance may take effect, in accordance with such certificate, 30 days after the date of issuance thereof. If such a certificate is issued after an investigation pursuant to such paragraph (3), actual abandonment or discontinuance may take effect, in accordance with such certificate, 120 days after the date of issuance thereof.

(5)(a) Each carrier by railroad subject to this part shall, within 180 days after the date of promulgation of regulations by the Commission pursuant to this section, prepare, submit to the Commission, and publish, a full and complete diagram of the transportation system operated, directly or indirectly, by such carrier. Each such diagram which shall include a detailed description of each line of railroad which is "potentially subject to abandonment", as such term is defined by the Commission. Such term shall be defined by the Commission by rules and such rules may include standards which vary by region of the Nation and by railroad or group of railroads. Each such diagram shall also identify any line of railroad as to which such carrier plans to submit an application for a certificate of abandonment or discontinuance in accordance with this section. Each such carrier shall submit to the Commission and publish, in accordance with regulations of the Commission, such amendments to such diagram as are necessary to maintain the accuracy of such diagram.

(b) The Commission shall not issue a certificate of abandonment or discontinuance with respect to a line of railroad if such abandonment or discontinuance is opposed by—

(i) a shipper or any other person who has made significant use (as determined by the Commission in its discretion) of such line of railroad during the 12-month period preceding the submission of an applicable application under paragraph (1); or

(ii) a State, or any political subdivision of a State, if such line of railroad is located, in whole or in part, within such State or political subdivision;

unless such line or railroad has been identified and described in a diagram or in an amended diagram which was submitted to the Commission under subdivision (a) at least 4 months prior to the date of submission of an application for such certificate.

(6)(a) Whenever the Commission makes a finding, in accordance with this section, that the public convenience and necessity permit the abandonment or discontinuance of a line or railroad, it shall cause such finding to be published in the Federal Register. If, within 30 days of such publication, the Commission further finds that—

(i) a financially responsible person (including a government entity) has offered financial assistance (in the form of a rail service continuation payment) to enable the rail service involved to be continued; and

(ii) it is likely that such proffered assistance would—

(A) cover the difference between the revenues which are attributable to such line of railroad and the avoidable cost of providing rail freight service on such line, together with a reasonable return on the value of such line; or

(B) cover the acquisition cost of all or any portion of such line of railroad;

the Commission shall postpone the issuance of a certificate of abandonment or discontinuance for such reasonable time, not to exceed 6 months, as is necessary to enable such person or entity to enter into a binding agreement, with the carrier seeking such abandonment or discontinuance, to provide such assistance or to purchase such line and to provide for the continued operation of rail services over such line. Upon notification to the Commission of the execution of such an assitance or acquisition and operating agreement, the Commission shall postpone the issuance of such a certificate for such period of time as such an agreement (including any extensions or modifications) is in effect.

(b) A carrier by railroad subject to this part shall promptly make available, to any party considering offering financial assistance in accordance with subdivision (a), its most recent reports on the physical condition of any line of railroad with respect to which it seeks a certificate of abandonment or discontinuance, together with such traffic, revenue, and other data as is necessary to determine the amount of assistance that would be required to continue rail service.

(7) Whenever the Commission finds, under paragraph (6)(a) of this section, that an offer of financial assistance has been made, the Commission shall determine the extent to which the avoidable cost of providing rail service plus a reasonable return on the value of the rail properties involved exceed the revenues attributable to the line of railroad or the rail service involved.

(8) Petitions for abandonment or discontinuance which were filed and pending before the Commission as of the date of enactment of this section or prior to the promulgation by the Commission or regulations required under this section shall be governed by the provisions of section 1 of this Act

which were in effect on such date of enactment, except that paragraphs (6) and (7) of this section shall be applicable to such petitions.

(9) Any abandonment or discontinuance which is contrary to any provision of this section, of any regulation promulgated under this section, or of any terms and conditions of an applicable certificate, may be enjoined by an appropriate district court of the United States in a civil action commenced and maintained by the United States, the Commission, or the attorney general or the transportation regulatory body of an affected State or area. Such a court may impose a civil penalty of not to exceed $5,000 on each person who knowingly authorizes, consents to, or permits any violation of this section or of any regulation under this section.

(10) In any instance in which the Commission finds that the present or future public convenience and necessity permit abandonment or discontinuance, the Commission shall make a further finding whether such properties are suitable for use for other public purposes, including roads or highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the Commission finds that the properties proposed to be abandoned are suitable for other public purposes, it shall order that such rail properties not be sold, leased, exchanged, or otherwise disposed of except in accordance with such reasonable terms and conditions as are prescribed by the Commission, including, but not limited to, a prohibition on any such disposal, for a period not to exceed 180 days after the effective date of the order permitting abandonment unless such properties have first been offered, upon reasonable terms, for acquisition for public purposes.

(11) As used in this section:

(a) The term "avoidable cost" means all expenses which would be incurred by a carrier in providing a service which would not be incurred, in the case of discontinuance, if such service were discontinued or, in the case of abandonment, if the line over which such service was provided were abandoned. Such expenses shall include but are not limited to all cash inflows which are foregone and all cash outflows which are incurred by such carrier as a result of not discontinuing or not abandoning such service. Such foregone cash inflows and incurred outflows shall include (i) working capital and required capital expenditures, (ii) expenditures to eliminate deferred maintenance, (iii) the current cost of freight cars, locomotives and other equipment, and (iv) the foregone tax benefits from not retiring properties from rail service and other effects of applicable Federal and State income taxes.

(b) The term "reasonable return" shall, in the case of a railroad not in reorganization, be the cost of capital to such railroad (as determined by the Commission), and, in the case of a railroad in reorganization, shall be the mean cost of capital of railroads not in reorganization, as determined by the Commission.

Section 1(18)-1(20) of the Interstate Commerce Act, 49 U.S.C. 1(18)-1(20):

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or

the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

Supreme Court, U. S.
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No. 76-1700

IN THE

Supreme Court of the United States

October Term, 1976

PEOPLE OF THE STATE OF ILLINOIS, *et al.*,
Petitioners

vs.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents

BRIEF OF THE BALTIMORE AND OHIO RAILROAD COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION OF THE COURT	2
QUESTIONS PRESENTED FOR REVIEW	2
STATUTE INVOLVED	2
I STATEMENT	2
II REASONS WHY CERTIORARI SHOULD NOT BE GRANTED	4
A. Summary of Argument	4
B. The Proceedings Before the Interstate Commerce Commission	4
C. The Decision of the Court of Appeals in this Case Does Not Involve a Question of Law Which Has Not Been Settled By This Court, Nor Is It in Conflict With a Decision of This Court, or Any Other Federal Court of Appeals	13
III CONCLUSION	16
Appendix 1 – I.C.C. Exhibit H-14, Statement of Mr. Frank Rongione	1a

TABLE OF AUTHORITIES

Cases

	PAGE
Akron, C. & Y. Ry. Co. v. *United States,* 22 F. 2nd 199	12
American Trucking Association v. *United States,* 326 U.S. 77	12, 13
Asbury v. *United States,* 298 F. Supp. 589	10
Colorado v. *United States,* 271 U.S. 153	17
Communications Comm'n. v. *WJR,* 337 U.S. 265	12
Federal Communications Comm. v. *Pottsville Broadcasting Co.,* 309 U.S. 134	12
I.C.C. v. *Jersey City,* 322 U.S. 503	17
Memphis Light, Gas & Water Div. v. *F.P.C.,* 243 F. 2nd 628	12
Moeller v. *Interstate Commerce Commission,* 201 F. Supp. 583	9-11
New York v. *United States,* 331 U.S. 284	11
NLRB v. *Local Joint Executives Board of Hotel and Restaurant Employees,* 301 F 2nd 1949	12
Purcell v. *United States,* 315 U.S. 381	10
Railway Express Agency v. *United States,* 205 F. Supp. 831	12
Texas v. *United States,* 292 U.S. 522	17
United Air Lines v. *C.A.B.,* 228 F. 2nd 13	12
United States v. *Northern Pacific Ry.,* 288 U.S. 490	12
United States v. *Pierce Auto Lines,* 327 U.S. 515	12
Universal Camera Corp. v. *National Labor Relations Board,* 340 U.S. 474	17

	PAGE
Wales v. *United States*, 108 F. Supp. 928	12
Washington and Old Dominion Users Ass'n. v. *United States*, 287 F. Supp. 528	11
Textbook	
1 K. Davis, Administrative Law Treatise 573 (1958)	11

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OPINIONS BELOW

The unpublished per curiam orders of the United States Court of Appeals for the Seventh Circuit are printed as Appendices A, B and C to the Petition herein.

The unreported orders of the Interstate Commerce Commission are printed as Appendices E through H to the Petition herein.

JURISDICTION OF THE COURT

The decisions of the United States Court of Appeals for the Seventh Circuit, and the Interstate Commerce Commission are wholly in accord with sound and well-settled principles of law. The Petition for a Writ of Certiorari presents no valid reason for the exercise of this Court's discretion to review the decisions below.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Seventh Circuit properly held that the Interstate Commerce Commission had not abused its discretion by declining to consolidate three rail line abandonment proceedings.

2. Whether the United States Court of Appeals for the Seventh Circuit properly held that the Interstate Commerce Commission had not improperly considered the Beardstown line abandonment (Finance Docket No. 26745) in a vacuum, without proper regard for interrelationships with two other rail line segments.

STATUTE INVOLVED

The statute involved is the railroad line abandonment provisions of Section 1 of the Interstate Commerce Act, 49 U.S.C. 1, which is printed as Appendix J to the Petition herein.

I

STATEMENT

A brief statement of the facts is given here to show that there are no special or important reasons why certiorari should be granted.

The Interstate Commerce Commission, after receiving evidence at a public hearing held at Springfield, Illinois, on July 10 and 11, 1972, concluded that the public convenience and necessity permitted abandonment of the

43.7 mile railroad line between Beardstown and Coal Shaft (Springfield) Illinois, owned by The Baltimore and Ohio Railroad Company (B&O).

The Commission authorized abandonment of this line because:[1]

(a) Less than one carload of traffic per day originated or terminated on the entire 43.7 mile line.

(b) The track was in poor physical condition, requiring more than $2,800,000 of rehabilitation; and there was no possibility that the cost of rehabilitation could be recouped from the earnings of the line.

(c) Only two shippers appeared at the hearing in opposition to the abandonment, and one of the shippers subsequently dropped its opposition. The Commission said that the paucity of shipper objection to abandonment is a factor to be considered in determining whether public convenience and necessity permit abandonment.

(d) The City of Springfield, Illinois expressed support for the abandonment which will enable the operation of B&O trains through the central downtown district of that city to be discontinued, thereby saving the public authorities an estimated $2,000,000 to $3,000,000 relocation expense.

The Interstate Commerce Commission approved abandonment because of the insignificant amount of traffic handled on the line; the absence of any foreseeable traffic potential in the future; the marginal nature of the operation; the large rehabilitation costs necessary to continue service; and the general lack of interest by shippers in continued operation. [Appendix E]

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[1] See Appendix E. References to Appendices in this Brief are to the Appendices to the Petition for a Writ of Certiorari, unless otherwise stated.

The United States Court of Appeals for the Seventh Circuit, in denying the Petition to set aside the order of the I.C.C. which authorized abandonment said,

> "We begin our consideration by noting that petitioners do not directly attack the substantive conclusion of the I.C.C. that the public convenience and necessity permit abandonment of the northern segment" i.e. the 43.7 mile line between Beardstown and Coal Shaft (Springfield), Illinois. [Appendix A, page 3a]

II

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

A. Summary of Argument

The substance of petitioners' complaint in the Court of Appeals was that the I.C.C. failed to consolidate three B&O abandonment proceedings, and thereby improperly considered the northern segment in a vacuum, without proper regard for interrelationships with two other lines which B&O sought to abandon. That argument is repeated in the Petition for a Writ of Certiorari. The facts, however, clearly establish that the I.C.C. did not abuse its discretion in deciding not to consolidate the proceedings, nor did it consider the northern segment without proper regard for interrelationships with other B&O lines.

B. The Proceedings Before The Interstate Commerce Commission

The Commission did not act arbitrarily or capriciously, nor did it abuse its discretion, in refusing to consolidate the northern segment abandonment with the other proceedings. In fact, it had valid and proper reasons for denying consolidation, as will be discussed, infra.

The Commission assigned B&O's application to abandon the "northern segment" Beardstown branch (Finance Docket No. 26745), and B&O's application to abandon its Shawneetown line (Finance Docket No. 26965) the so-called "southern segment" to the same Administrative Law Judge, Gerald E. Jessup, for hearings and the recommendation of appropriate Orders.

Judge Jessup held a hearing at Carmi, Illinois on June 19-20, 1972, on the Shawneetown abandonment application, and he held a hearing on the Beardstown application on July 10-11, 1972, at Springfield, Illinois. [Appendix E]

Judge Jessup released simultaneous Reports and Orders covering both proceedings on February 14, 1973. The Administrative Law Judge approved the abandonment of the Beardstown line, but he denied the abandonment of the Shawneetown line.[2]

In denying the petition to consolidate both cases, Judge Jessup set forth the reasons for his decision:

> First, he pointed out that each proceeding was clearly identifiable and separate.
>
> Secondly, he found that the shippers and their interests were different.
>
> Thirdly, Judge Jessup said the disposition of the applications is different, i.e., he approved the abandonment of the Beardstown line, but he denied the abandonment of the Shawneetown line. In the case of Beardstown, he found a paucity of shipper opposition to the abandonment, and an absence of any foreseeable traffic potential, whereas in the Shawneetown proceeding, he found that

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[2] The Commission affirmed the Administrative Law Judge on February 17, 1977, in Finance Docket No. 26965 when it dismissed B&O's application to abandon the Shawneetown line. On that same date the Commission authorized the sale of that line to Praire Trunk Railway. [See Appendix I]

the record indicated a very substantial traffic potential, and that the shippers in the area need rail service.

In the Beardstown decision, Judge Jessup emphasized that rail service is available at Beardstown by the Burlington Northern Railroad, and at Ashland by Illinois Central Gulf, and that a number of motor common carriers serve points along the Beardstown line. He mentioned that in addition to motor common carrier service being available, the record showed several shippers on the Beardstown branch operated their own trucks, whereas in his Report and Order denying the abandonment of the Shawneetown line, Judge Jessup said the record fails to establish that there are motor carrier services available in the area to meet the transportation needs of the shippers, and that the Shawneetown line serves a definite transportation need in the area without which some businesses will not have satisfactory transportation service, and others will be adversely affected to the general detriment of the area involved.

Fourthly, the Administrative Law Judge commented that the Beardstown and Shawneetown lines are physically separated by more than 100 miles and are operated separately.[3]

Fifthly, Judge Jessup said that during the entire year of 1971, of the total of 2,505 freight cars handled over the Beardstown and Shawneetown lines, only 14 cars moved over both lines. In other words, there was no common traffic relationship, or affiliation, between the two lines which would necessitate, or require, that the proceedings be heard and disposed of on a consolidated record. It is for this reason that the Administrative Law Judge said,

[3] The Beardstown line and the Flora to Sangamon Junction line (the so called middle segment) are physically separated by more than 5 miles. [Appendix A, p. 2a]

> "Each of the proceedings is clearly identifiable and separate, the shippers and their interests are different, and the proposed disposition of the applications are different, based upon different facts and circumstances applicable to the respective applications." [Appendix E, p. 17a]

Petitioners contend that Judge Jessup committed error in not requiring B&O to provide data with respect to the cars handled on the Beardstown line which also moved on the B&O line between Flora and Sangamon Junction (the middle segment). The Administrative Law Judge, however, set forth an entirely valid and justifiable reason for not encumbering the record in the Beardstown proceeding with inconsequential data. He stated in his Report and Order that the record showed the "predominance" of the Beardstown traffic moves to or from B&O's Indianapolis Division – and therefore does not move over the middle segment at all –and he concluded that such traffic data was not essential for a decision in the Beardstown proceeding. [Appendix E, pages 18a and 19a].

Of course, when his ruling was issued, Judge Jessup was aware that the record showed that the Beardstown line originated or terminated less than one car of traffic per day, and that the "predominance" of the very limited amount of Beardstown traffic, small as it was, moved from the Beardstown line (northern segment) to B&O's Indianapolis Division, and therefore did not move over the middle segment at all.

Petitioners assert in this Court, as they did in the Court below, that the Commission erred in permitting abandonment of the Beardstown line, "without evidence concerning the impact of that abandonment upon the continued viability of the remaining middle and southern segments."

Even the most cursory reading of the Petition for a Writ of Certiorari immediately reveals that it does not

disclose how Petitioners have been prejudiced, damaged, or adversely affected by the Commission's decision to not consolidate the Beardstown proceeding with the other two cases. In the Court below, Petitioners argued that even though the Beardstown line was operated at a loss, it might be desirable to continue that loss operation because the Beardstown line "feeds" traffic to other B&O lines, including the "middle" and "southern" segments. Petitioners speculated that a loss on the Beardstown line "might" be more than offset by profits on one or more other segments, and that discontinuance of service on the Beardstown line might result in greater overall losses to B&O on its other lines.

The basic error in that speculation is that the deficit on the Beardstown branch – under I.C.C. costing and revenue procedures – took into consideration the earnings contribution the Beardstown traffic made to all other B&O lines and segments, including the middle and southern segments; and even with that contribution from the other segments, the operation of the Beardstown line still produced an overall net loss to the B&O railroad system.

The I.C.C. regulations, which apply to all abandonment proceedings, required B&O to show the total revenues generated by the cars transported over the Beardstown line, including the revenues which the Beardstown traffic produced while moving over other B&O system lines and segments, including the Shawneetown branch and the Sangamon Junction to Flora line. The costs of transporting the cars on the Beardstown line, and the cost of handling the Beardstown cars on the other B&O lines and segments were then deducted from the revenue.

The loss incurred in operating the Beardstown line, which Judge Jessup listed in his decision, took into consideration the fact that the operation of the Beardstown branch produced a deficit of $66,638, and the traffic from the Beardstown branch while moving over the other B&O

lines and segments produced earnings of $53,513.[4] Subtracting those earnings from the $66,638 branch deficit results in a B&O System Net Railway Operating Deficit of $13,125.

In other words, the costing and revenue procedures mandated by the I.C.C. regulations are intentionally and deliberately designed to guarantee that the abandonment of a branch line does not take place in a vacuum without regard to its interrelationship to other segments of the carrier. This is accomplished by the Commission's regulations which require the applicant to show the earnings which the line proposed to be abandoned generates to other lines and segments of that carrier.

Set forth as Appendix 1 to this Brief is Exhibit H-14, the testimony of Mr. Rongione, B&O's Manager of Profit Margin Research, which was received into evidence by Judge Jessup at the I.C.C. hearing held at Springfield, Illinois on July 10-11, 1972. Mr. Rongione, in following I.C.C. cost procedures, took the total revenue generated by the Beardstown branch and allocated that revenue to the branch, and to the other B&O lines and segments, by using the I.C.C.'s prorate method, i.e., the mathematical ratio of the car miles moved over the branch to the car miles moved over the other B&O segments. Line 4 at page 5a shows that in 1971 the Beardstown branch produced total revenues to B&O of $165,679. At line 5, revenue of $58,653 was assigned to the branch by the mileage prorate method, and at line 6, revenue of $107,026 was assigned to the other B&O lines and segments. At line 7, miscellaneous revenue charges of $2,080 was credited to the branch.

Pages 10a and 11a of the Appendix contain a summary of total revenues and costs, showing that for 1971

[4] See *Moeller* v. *Interstate Commerce Commission*, 201 F. Supp. 583, 587, for a discussion of the Commission's formula for determining the "feeder value" of a branch line to the other segments of the railroad.

that the Beardstown branch had revenues of $60,733 and incurred costs of $127,371, thereby producing a deficit of $66,638. It also shows that the traffic handled on the Beardstown branch produced revenue on the other lines and segments of B&O (including the middle and southern segments) totalling $107,026, and that the cost of handling this traffic on the other B&O lines and segments was $53,513.

Finally, pages 10a and 11a show that the Beardstown branch in 1971 generated total B&O system revenues of $167,759 [Line 3(c)] and that B&O incurred total system costs of $180,884 in handling this traffic [$127,371 costs on the branch and $53,513 on the balance of the B&O System] for a Net Railway Operating Deficit of $13,125.

Petitioners' contention that the I.C.C. erred in permitting abandonment of the Beardstown line, without evidence concerning the impact upon the viability of the remaining line segments of B&O, is simply not supported by the facts. Petitioners' argument that B&O should continue to operate the Beardstown branch at a loss because of its "feeder" value to other B&O lines, such as the middle and southern segments, is invalid and should be rejected by this Court, as it was by the Court below.

As the Commission said in authorizing the abandonment of the Beardstown branch, "There is no possibility that the costs of rehabilitation [$2,800,000] can be recouped from the earnings of the branch." [Appendix E, p. 28a]

The Commission and the courts have held in many decisions that even a profitable operation of a branch line will not preclude abandonment where the evidence shows that the continued operation of the lightly used line would require expensive maintenance, repair or rehabilitation expenditures. *Purcell* v. *United States*, 315 U.S. 381, 382, 385; *Asbury* v. *United States*, 298 F. Supp. 589, 593.

In *Moeller* v. *Interstate Commerce Commission*, 201 F. Supp. 583, the Court, at Page 587, discusses the Com-

mission's formula for determining the "feeder value"[5] of a branch line proposed for abandonment to the other segments and lines of the carrier, and at page 588, the Court says:

> "In regard to the matter of determining the allocation of revenues and costs of operation of a branch line, the experience of the Commission is of importance. Because of its experience in that field, the findings of the Commission as to the proper allocation of revenues and expenses should not be overturned unless it can be shown that such allocations were arbitrary or otherwise clearly erroneous."

This Court pointedly remarked in *New York* v. *United States*, 331 U.S. 284, 328:

> "We start, of course, from the premise that on a subject of transportation economics, such as this one, the Commission's judgment is entitled to great weight. The appraisal of costs figures is itself a task for experts."

Petitioners have failed to show that the Commission's refusal to consolidate the three proceedings was arbitrary, capricious or an abuse of discretion. They have also failed to substantiate, in any manner, whatsoever, that they were adversely affected by the Agency's action.

In the words of Professor Davis in 1 *Administrative Law Treatise* 573 (1958):

---

[5] In *Washington and Old Dominion Users Ass'n.* v. *United States*, 287 F. Supp. 528, at 532-3, the Court sustained the Commission's abandonment order even though the record did not contain "specific evidence" of the feeder value, because the record as a whole showed the amount would be de minimis. In the Beardstown proceeding the "specific evidence" of the $53,513 feeder value of the branch is in the record, and it is less than the $66,638 deficit incurred in operating the branch. In authorizing abandonment the Commission concluded that B&O should not be required to spend $2,800,000 to rehabilitate a line that causes a B&O system deficit of $13,125.

"The dominant feature of judicial opinions on challenges of administrative orders consolidating or refusing to consolidate proceedings is that the problem is for agency discretion. The Supreme Court has frequently so asserted in cases coming up from the ICC."

Courts have sustained the Commission's consolidation of proceedings, *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 523 (1946); *Wales* v. *United States*, 108 F. Supp. 928, 932 (N.D. Tex. 1952), aff'd mem., 345 U.S. 954 (1953); *Akron, C. & Y. Ry. Co.* v. *United States*, 22 F. 2d 199, 202 (W.D.N.Y. 1927), as well as its refusal, upon request, to order the consolidation of proceedings. *United States* v. *Northern Pacific Ry.*, 288 U.S. 490, 501-502 (1933); *Railway Express Agency* v. *United States*, 205 F. Supp. 831, 835 (S.D.N.Y. 1962). As this Court said in *American Trucking Associations* v. *United States*, 326 U.S. 77, 83 (1945), "*** the Commission may wish to consolidate hearings on the applications, but that is a matter of administrative discretion."

In *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940), the Supreme Court said:

"[T]he scope of the inquiry, whether applications, should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions — were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest."

Accord, *Communications Comm'n.* v. *WJR*, 337 U.S. 265, 283 (1949); *N.L.R.B.* v. *Local Joint Executive Board of Hotel and Restaurant Employees*, 301 F. 2d 149, 155-56 (9th Cir. 1962); *Memphis Light, Gas & Water Div.* v. *F.P.C.*, 243 F. 2d 628, 631 (D.C. 1957); *United Air Lines* v. *C.A.B.*, 228 F. 2d 13, 16 (D.C. Cir. 1955).

C. The Decision of the Court of Appeals in This Case does Not Involve a Question of Law Which Has Not Been Settled by This Court, nor Is It in Conflict With a Decision of This Court, or Any Other Federal Court of Appeals

In sustaining the Interstate Commerce Commission below, the Court of Appeals said that "the choice of whether or not to consolidate related proceedings is 'a matter for administrative discretion'". Furthermore, contrary to the assertions of Petitioners, the decision of the Court below clearly establishes that it is not in conflict with this Court's opinion in *American Trucking Ass'ns.* v. *U.S.*, 326 U.S. 77 (1945). The Court below said at pages 3a-6a of Appendix A,

"We begin our consideration by noting that petitioners do not directly attack the substantive conclusion of the ICC that the public convenience and necessity permit abandonment of the northern segment. Instead, they argue that the ICC improperly considered the northern segment abandonment application in a vacuum, without proper regard for interrelationships between all three segments which they characterize as part of one 228-mile line.***

First, petitioners assert that the ICC should have consolidated the northern and southern segment proceedings in response to their 1972 motion, and should have reopened both of these for consolidation with the middle segment proceeding in response to their 1973 motion. We disagree. The choice of whether or not to consolidate related proceedings is "a matter for administrative discretion," *American Trucking Associations, Inc.* v. *United States*, 326 U.S. 77, 83 (1945), and it is not for this court to dictate to the ICC the procedures it should follow in discharging its duties, *See Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). As the District of Columbia Circuit recently recognized:

> 'No principle of administrative law is more firmly established than that of agency control of its own calendar. Practical problems of calendar administration confront an agency whenever related applications are pending at the same time. Consolidation *** and similar questions are housekeeping details addressed to the discretion of the agency and, due process or statutory considerations aside, are no concern of the courts.'

Association of Massachusetts Consumers, Incorporated v. *United States Securities and Exchange Commission*, 516 F. 2d 711, 714 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976), quoting *City of San Antonio* v. *Civil Aeronautics Board*, 374 F. 2d 326, 329 (D.C. Cir. 1967). *See also* 1 *K. Davis, Administrative Law Treatres* § 8.12, at 572-73 (1958). There are no statutory or due process considerations present here, and no suggestion is made that the comparative hearing exception of *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327 (1945), and its progeny, has any application to this case. We perceive no abuse of the ICC's substantial discretion in this regard; both the ALJ's decision and the Commission's 1975 order denying consolidation after B&O sought to abandon the middle segment set out sound reasons for denying consolidation, and it is not our function to second-guess these determinations.

Petitioners' second argument, which relies heavily on *American Trucking Associations, Inc.* v. *United States, supra*, is that even if the ICC was not obliged to consolidate the segment proceedings, it was obliged, in determining the public convenience and necessity, to consider the effects of abandoning each segment on the other segments. In *American Trucking*, a rail carrier filed fourteen applications for authorities to conduct trucking services auxiliary to its rail services, parallel to the railroad's main lines and covering most of the distance between Richmond, Virginia and Jacksonville, Florida. Numerous entirely independent hearings were conducted on a segmented basis, and evidence of the effect of the proposed service on non-

rail carriers in the areas covered was excluded in each proceeding. The Court did require that evidence be admitted pertinent to the effect on motor carriers of all the applicant's routes, and stated that evidence of truck flow from points covered by one application to points covered by one application to points covered by another could not be excluded. 326 U.S. at 85. We think that the requirement of assessing impact on non-rail carriers which did not limit their operations to the neat little geographic packages represented in the fourteen applications made a stronger case for consideration of segment interrelationships in *American Trucking* than is present in this abandonment proceeding. But assuming *arguendo*, that appropriate consideration of possible interrelationships was required here, we believe any such requirement was met.

With reference to the only two abandonment applications pending at the time, covering the northern and southern segments, the same ALJ heard both proceedings and was thoroughly familiar with the comparative considerations underlying both. He concluded that "[e]ach of the proceedings is clearly identifiable and separate," and that "the shippers and their interest are different." We have reviewed the record, and we surely cannot say that these findings lack substantial support in the evidence. In this regard, we think it is significant that the record shows that the preponderance of northern segment traffic moved east from Sangamon Junction to Indianapolis and did not travel on either the middle or southern segments, and that of more than 2500 cars moving over either the northern or southern segments in 1971, only 14 moved on both segments. We also note that the ALJ found the conditions pertaining to the northern and southern segments to be so different that he recommended granting the former and denying the later application for abandonment.

With respect to interrelationships between the northern and middle segments, we repeat the important fact that no application for abandonment of the middle segment had been made at the time of

hearing or initial decision on the northern segment. We do not believe it was incumbent on the ALJ to forecast B&O's intentions regarding the middle segment in 1972 and to design his hearing schedule and evidentiary rulings on the basis of the then unfounded assumption that abandonment was in the works. *Cf. American Trucking, supra*, 326 U.S. at 83. Nor do we think there was any requirement that the ICC, in determining the public convenience and necessity, reopen this proceeding more than two years after the record was closed and recommendations were made because B&O did ultimately file an abandonment application on the middle segment in 1975. In any case, the ALJ had before him evidence that most of the northern segment traffic travelled on east to Indianapolis rather than southeast over the middle and/or southern segments. Because the northern segment traffic was light to begin with, we surely cannot say that the ALJ's later-adopted report inadequately considered appropriate interrelationships. Petitioners contention that they were improperly denied access to more specific breakdowns on traffic data relating the northern and middle segments must be rejected for similar reasons."

III

CONCLUSION

The Commission's Order is proper and should not be set aside. The Interstate Commerce Commission concluded that the public convenience and necessity permits abandonment of the Beardstown line. This conclusion was reached because of the insignificant amount of traffic handled on the line; the absence of any foreseeable traffic potential in the future; the marginal nature of the operation; the large rehabilitation costs necessary to continue service; and the general lack of interest by shippers in continued operation of the line.

The purpose of the Interstate Commerce Act is to foster the development and preservation of a national transportation system adequate to meet the needs of the country. This purpose clearly contemplates the elimination of waste and unnecessary expenditures which burden interstate commerce. *Texas* v. *United States*, 292 U.S. 522, 530. *Colorado* v. *United States*, 271 U.S. 153, 163, 168. As this Court said in *Colorado* v. *United States*, 271 U.S. at 168:

> The sole test prescribed is that abandonment be consistent with public necessity and convenience . . . . The benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce. Compare Proposed Abandonment by *Boston & Maine R.R.*, 105 I.C.C. 13, 16. The result of this weighing — the judgment of the Commission — is expressed by its order granting or denying the certificate.

This Court in *Universal Camera Corp.* v. *National Labor Relations Board*, 1951, 340 U.S. 474, 71 S. Ct. 456, 95 L.Ed. 456, has interpreted the Administrative Procedure Act to require affirmance of the findings of an administrative agency if, taking the record as a whole, they are supported by substantial evidence, that is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

The Commission's order is the product of expert judgment which carries a presumption of validity. "And he who would upset the *** order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." *I.C.C.* v. *Jersey City*, 322 U.S. 503, 512, 64 S. Ct. 1129, 1134, 88 L. Ed. 1420.

Here the Commission weighed the evidence, and the fact that the rehabilitation cost of the Beardstown line could not be recovered, against the need for service, as evidenced by the lack of interest in the continuance of rail operations by the shippers, and concluded to approve the abandonment. This finding is clearly supported by the facts of record. Indeed, Petitioners in asking this Court to review the Commission's Order do not, in any manner

whatsoever, attack the basic findings by the Commission that there is no possibility that B&O can recover the cost of rehabilitation from the earnings of the Beardstown line. As the Commission's Order says:

> "A carrier should not be required to continue indefinitely operation of a branch line which will not pay the cost of operation, maintenance and taxes ***. The Commission and the Courts often have expressed the view that improvident expenditures by a common carrier should not be required by governmental fiat. Cf., *Purcell* v. *United States*, 315 U.S. 381." [Appendix E, pages 28a-29a.]

Rule 19 of the Supreme Court Rules states that a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

Certainly this is a case where no special or important reasons exist for granting certiorari. On the contrary, it is one where the public interest will be served by denying it. Petitioners have failed to show that the decision of the U.S. Court of Appeals for the Seventh Circuit has decided an important question of federal law which has not been, but should be, settled by this Court or has decided a federal question in a way in conflict with applicable decisions of this Court.

The petition for certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent,
The Baltimore and Ohio
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APPENDICES

APPENDIX I

Exhibit H-14

My name is Frank Rongione. I am Manager of Profit Margin Research for The Chesapeake and Ohio Railway and The Baltimore and Ohio Railroad Company, and my office address is Room 2011, 1 Charles Center, Baltimore, Maryland.

I have been employed by the B&O since 1962 and the C&O-B&O since 1965. Prior to 1962, I was employed by the Pennsylvania Railroad for 15 years. The predominant part of my railroad service has been spent in railroad cost analysis work.

I received a Bachelor of Science degree from St. Joseph's College, Philadelphia, majoring in business administration. I have also done some graduate work in statistical techniques and analysis.

My duties encompass the preparation and/or directing the preparation of various revenue and cost studies for use by management or for use before various federal and state regulatory bodies. The data prepared for this proceeding, as shown in Appendices A to C attached, were prepared under my direction and supervision.

Appendix A – Shows for the years 1969, 1970 and 1971 the total revenue generated by branch patrons, i.e., B&O Revenue for loads originating and terminating and also the revenue for traffic moving overhead to the branch. The total revenue is assigned to the branch and balance of the B&O system by the usual method as approved by the Interstate Commerce Commission in Chicago & N. W. Railway Co. abandonment, 275. I.C.C. 759. Also shown are the other revenues generated by this branch, such as demurrage.

Appendix A-1 – Shows the revenue accruing to B&O family lines.

Appendix B – Shows the costs that would have been avoided if this branch had not been operated during the years 1969, 19 and 1971.

Appendix C – Shows that for the years 1969, 1970 and 1971 B&O incurred income of $16,876 in 1969; income of $27,882 in 1970; and a deficit of $13,125 in 1971 by operating this branch line.

The financial figures for 1969, 1970 and 1971 do not, however, tell the whole story, nor are they an accurate estimate of the magnitude of the deficits that will be incurred in the years ahead if the line is not abandoned. This is due to the fact that in past years, in an effort to economize and keep the line in service, B&O spent far less on maintenance than should have been spent. For example, in 1969, 1970 and 1971 maintenance expenditures were $39,877, $45,817 and $53,468, respectively, whereas a proper normalized level of maintenance required an expenditure of $132,382 per year.

Because less than a normalized amount has been spent in past years, the line now requires rehabilitation which will cost $1,630,644.[1]

If this line is not abandoned the projected deficit will be $217,089 per year in future years. This figure is based on 1971 traffic, revenue and costs except normalized maintenance of way costs and the rehabilitation expense of $1,630,644 have been taken into consideration. The cost to amortize the rehabilitation expenditure over a 30 year period at 7% interest is $130, 452 annually. Table I, below, shows the details:

[1] This $1,630,644 rehabilitation cost does not include $1.2 million rehabilitation for the bridges on the Beardstown line. Total rehabilitation expense exceeds $2.8 million. [See Judge Jessup's order, Appendix E, p. 20a]

TABLE I

PROJECTED NET RAILWAY OPERATING DEFICITS FOR FUTURE YEARS IF LINE IS NOT ABANDONED

Branch Revenues		$ 60,733
Branch Costs (Excluding Actual Maintenance of Way Costs)	$ 68,501	
Branch Normalized Maintenance of Way Costs	132,382	
Total Branch Costs		200,883
Branch Net Railway Operating Deficit	Deficit	($140,150)
Balance of B&O System Revenues		$107,026
Balance of B&O System Costs at 50%		53,513
Balance of B&O System Net Railway Operating Income		$ 53,513
B&O Net Railway Operating Deficit before Provision for Branch Rehabilitation	Deficit	($ 86,637)
Branch Rehabilitation Costs ($1,630,644 Amortized Over 30 years at 7% interest)		130,452
Projected Annual B&O Net Railway Operating Deficit	Deficit	($217,089)

In Ex Parte 274 the Interstate Commerce Commission said that it had recently completed a study of abandon-

ment proceedings before the commission in 1969 and 1970. Based on the findings in the study the Commission said that "*For a 12 month period, 34 carloads of freight traffic per mile of trackage are necessary to enable a railroad to operate the trackage on a break-even basis.*"

The traffic generated by this branch line is substantially below the 34 carloads per mile of track that the Commission said was required for a break-even operation. The carloads in 1971 were only 18 cars per track mile. In 1971 a total of 478 cars moved overhead to the branch. Upon abandonment this overhead traffic can be handled via other railroad junction points. A total of only 322 carloads originated or terminated on the branch, or only 7 cars per mile of track.

APPENDIX A

THE BALTIMORE AND OHIO RAILROAD COMPANY

BEARDSTOWN BRANCH

REVENUES FROM TRAFFIC HANDLED – 1969, 1970 AND 1971

	1969	1970	1971
1. Local Freight Originated at and Destined to Points on Line to be Abandoned	$ 1,180	$ 111	$ 0
2. Freight Moved Between Points on Line to be Abandoned and Points Beyond It	92,496	59,417	51,206
3. Overhead or Bridge to the Line to be Abandoned	87,769	140,879	114,473
4. Total Revenue Accruing to B&O Through Use of Line to be Abandoned (Sum of Lines 1-3)	$181,445	$200,407	$165,679
5. Revenue Accruing to Line Proposed to be Abandoned	61,644	72,560	58,653
6. Revenue Accruing to Balance of B&O (Line 4 minus Line 5)	$119,801	$127,847	$107,026
Other			
7. Miscellaneous Charges (Demurrage, Switching, etc.)	3,070	6,771	2,080
8. Total Revenues (Line 4 + Line 7)	$184,515	$207,178	$167,759

APPENDIX A-1

THE BALTIMORE AND OHIO RAILROAD COMPANY

BEARDSTOWN BRANCH

FAMILY LINE REVENUES AND COSTS ON TRAFFIC MOVING ON THE BEARDSTOWN BRANCH 1969, 1970, AND 1971

Item	Source	1969	1970	1971
1. Family Line Revenues				
(a) The Chesapeake and Ohio Railway	Division percent applied to freight charges on waybill or freight bill	$ 934	$ 974	$ 445
(b) Western Maryland Railway		114	–	19
2. Total Family Line Revenues	Line 1(a) + Line 1(b)	$1,048	$ 974	$ 464
3. Family Line Costs	50 percent of Line 2	524	487	232
4. Net Railway Operating Income	Line 2 minus Line 3	$ 524	$ 487	$ 232

APPENDIX B

THE BALTIMORE AND OHIO RAILROAD COMPANY

BEARDSTOWN BRANCH

AVOIDABLE MAINTENANCE AND OPERATING COSTS FOR THE YEARS 1969, 1970, AND 1971

Acct. No.	Account	Basis of Cost	1969	1970	1971
	Maintenance of Way				
202	Roadway Maintenance	Actual	$ 5,455	$ 6,279	$ 5,559
208	Bridges, Trestles & Culverts	Actual	2,482	2,857	10,767
212	Ties	Actual	1,000	1,150	1,000
214	Rails	Actual	0	0	0
216	Other Track Material	Actual	2,200	2,530	3,200
218	Ballast	Actual	300	345	0
220	Track Laying and Surfacing	Actual	24,002	27,628	25,070
221	Fences, Snowsheds & Signs	Actual	0	0	0
229	Roadway Buildings	Actual	200	230	0
249	Signals & Interlockers	Actual	2,682	3,087	5,396
272	Removing Snow, Ice & Sand	Actual	0	0	0
273	Public Improvement Maint.	Actual	0	0	0
277	Emp. Health & Welfare Benefits	Percent of Labor Cost	1,556	1,711	2,476
	Total Maintenance of Way		$ 39,877	$ 45,817	$ 53,468

THE BALTIMORE AND OHIO RAILROAD COMPANY
BEARDSTOWN BRANCH
AVOIDABLE MAINTENANCE AND OPERATING COSTS FOR THE YEARS 1969, 1970, AND 1971

Acct. No.	Account	Basis of Cost	1969	1970	1971
	Maintenance of Equipment				
311	Other Locomotives-Repairs	At System Cost per Unit Mile	$ 4,554	$ 5,361	$ 6,694
314 330 331	Car Costs	System Average Per Diem and Mileage Costs Times Branch Days and Car Miles (Excluding Overheads)	8,454	7,496	4,516
	Total Maintenance of Equipment		$ 13,008	$ 12,857	$ 11,210
	Transportation				
376	Station Expenses	Actual	$ 21,147	$ 20,526	$ 22,129
392	Enginemen	Actual	6,014	6,446	6,951
394	Train Fuel	At System Cost per Unit Mile	4,456	4,641	6,121
397	Water for Train Locomotives	At System Cost per Unit Mile	14	13	1/
398	Lubricants for Train Locomotives	At System Cost per Unit Mile	209	307	2/

THE BALTIMORE AND OHIO RAILROAD COMPANY
BEARDSTOWN BRANCH
AVOIDABLE MAINTENANCE AND OPERATING COSTS FOR THE YEARS 1969, 1970 AND 1971

Acct. No.	Account	Basis of Cost	1969	1970	1971
	Transportation				
399	Other Supplies for Train Locomotives	At System Cost per Unit Mile	180	237	1/
400	Servicing Train Locomotives	At System Cost per Unit Mile	0	0	278
401	Trainmen	Actual	13,666	14,580	15,982
402	Train Supplies & Expenses	At System Cost per Unit Mile	672	563	305
409	Emp. Health & Welfare Benefits	Percent of Labor Cost	1,268	1,470	1,736
	Total Transportation		$ 47,626	$ 48,783	$ 53,502
	Railway Tax Accruals				
532	Railroad Retirement & Unemployment	Tax Rate Applied to Labor Cost	$ 7,228	$ 7,915	$ 9,191
	Total Branch Costs		$107,739	$115,372	$127,371

1/ As result of I.C.C. Accounting changes 1/1/71; these expense items now included in Account 400. Above figures exclude enginehouse expenses (Account 400).

2/ As result of I.C.C. Accounting changes 1/1/71; this expense item now included in Account 311.

APPENDIX C

THE BALTIMORE AND OHIO RAILROAD COMPANY

BEARDSTOWN BRANCH

EFFECT OF PROPOSED ABANDONMENT ON NET RAILWAY OPERATING INCOME FOR THE YEARS 1969, 1970, AND 1971

Item	Source	1969	1970	[illegible]
1. Line Proposed to be Abandoned				
(a) Revenues – Freight	Appendix A	$ 61,644	$ 72,560	$ 58,653
(b) Revenues – Other	Appendix A	3,070	6,771	2,080
(c) Total Revenues	Line 1(a) + Line 1(b)	$ 64,714	$ 79,331	$ 60,733
(d) Costs	Appendix B	107,739	115,372	127,371
(e) Net Railway Operating Deficit	Line 1(c) Minus Line 1(d)	$(43,025)	$(36,041)	$(66,638)
2. Balance of B&O System				
(a) Revenues – Freight	Appendix A	$119,801	$127,847	$107,026
(b) Revenues – Other		0	0	0
(c) Total Revenues	Line 2(a) + Line 2(b)	$119,801	$127,847	$107,026
(d) Cost	50% of Line 2(c)	59,900	63,924	53,513
(e) Net Railway Operating Income	Line 2c( ) Minus Line 2(d)	$ 59,901	$ 63,923	$ 53,513

10a

APPENDIX C – Continued

THE BALTIMORE AND OHIO RAILROAD COMPANY

BEARDSTOWN BRANCH

EFFECT OF PROPOSED ABANDONMENT ON NET RAILWAY OPERATING INCOME FOR THE YEARS 1969, 1970, AND 1971

Item	Source	1969	1970	1971
3. Total B&O System				
(a) Revenues – Freight	Line 1(a) + Line 2(a)	$181,445	$200,407	$165,679
(b) Revenues – Other	Line 1(b) + Line 2(b)	3,070	6,771	2,080
(c) Total Revenues	Line 3(a) + Line 3(b)	$184,515	$207,178	$167,759
(d) Costs	Line 1(d) + Line 2(d)	167,639	179,296	180,884
(e) Net Railway Operating Income (Deficit)	Line 3(c) Minus Line 3(d)	$ 16,876	$ 27,882	$(13,125)

11a

Supreme Court, U. S.
FILED
AUG 31 1977
MICHAEL RODAK, JR., CLERK

No. 76-1700

In the Supreme Court of the United States

OCTOBER TERM, 1977

PEOPLE OF THE STATE OF ILLINOIS, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not yet reported. The orders of the Interstate Commerce Commission in Finance Docket No. 26745, *The Baltimore and Ohio Railroad Company Abandonment Between Coal Shaft and Beardstown, Illinois* (Pet. App. 14a-48a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 11a) was entered on March 23, 1977. A petition for rehearing was denied on April 22, 1977 (Pet. App. 12a). The petition for a writ of certiorari was filed on May 31, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Interstate Commerce Commission abused its discretion in permitting a railroad to abandon a 43-mile segment of rail line without consolidating the proceeding with separate applications seeking the abandonment of other, economically distinct segments of rail line.

STATEMENT

Petitioners seek review of a decision affirming orders of the Interstate Commerce Commission authorizing the Baltimore and Ohio Railroad Company ("B&O") to abandon 43.7 miles of railroad line between Beardstown and Coal Shaft, Illinois.

B&O operates a 228-mile line of track running in a southeasterly direction from Beardstown, Illinois, on the Illinois River to Shawneetown, Illinois, on the Ohio River. The line has a northern, middle, and southern segment (Pet. App. 19a).[1]

B&O filed an abandonment application for the northern segment on August 13, 1971, and for the southern segment on December 22, 1971. Both applications were assigned to the same Administrative Law Judge ("ALJ").

[1]The Beardstown-Coal Shaft line (northern segment) proceeds 43.7 miles from Beardstown to the western outskirts of Springfield. Approximately five miles of Chicago and Illinois Midland track and joint Illinois Central B&O track proceed through Springfield, connecting the Beardstown-Coal Shaft line and Sangamon Junction. At Sangamon Junction, the B&O line divides, one line running east to Indianapolis, the other running approximately 111 miles southeast from Sangamon Junction to Flora (middle segment) and then some 73 miles from Flora to Shawneetown (southern segment). The St. Louis-Baltimore main line of the B&O intersects the middle and southern segments at Flora (Pet. App. 2a, 19a).

who scheduled separate hearings for each application. During the hearings on the southern segment in June 1972, B&O counsel announced that a further application was to be filed seeking abandonment of the middle segment, but he subsequently stated that this representation was incorrect because the carrier's management had not yet decided whether to seek abandonment of the middle segment. A separate hearing on the northern segment was conducted as scheduled in July 1972 (Pet. App. 2a, 16a).

In June 1972, petitioners had moved that the two pending proceedings and the proposed middle segment proceeding be consolidated (Pet. App. 16a).

In January 1973, the ALJ denied consolidation of the two proceedings before him (Pet. 17a). He also issued separate reports on the northern and southern segments, recommending that the Commission authorize abandonment of the northern segment but not the southern segment (Pet. App. 2a, 14a-32a).

Final action on the ALJ's initial reports was held in abeyance by the Commission pending the outcome of an appeal before the United States Court of Appeals for the Second Circuit, relating to procedures applicable to the preparation of environmental impact statements by the Commission (Pet. App. 2a-3a).[2]

In March 1975, B&O applied for authority to abandon the middle segment. Petitioners moved to consolidate the northern and southern segment proceedings with the middle segment proceeding. The motion was denied (Pet.

[2]*Harlem Valley Transportation Association* v. *Stafford*, 500 F. 2d 328 (C.A. 2). Petitioners raised such an issue below (Pet. App. 7a-10a), but have not presented it here.

App. 33a-34a).[3] The Commission's Review Board No. 5 thereafter affirmed and adopted the report of the ALJ authorizing abandonment of the northern segment line. Division 3 of the Commission denied reconsideration (Pet. App. 35a-40a).

On petition for review, the court of appeals affirmed, rejecting petitioners' contention that the Commission should have consolidated the three proceedings or otherwise have considered the effect abandoning the northern segment would have on the middle and southern segments. The court held that the "choice of whether or not to consolidate related proceedings is 'a matter for administrative discretion,'" and that "both the ALJ's decision and the Commission's 1975 order denying consolidation after B&O sought to abandon the middle segment set out sound reasons for denying consolidation, and it is not our function to second-guess these determinations" (Pet. App. 3a-4a).

The court distinguished *American Trucking Associations, Inc.* v. *United States*, 326 U.S. 77, on the ground that its facts "made a stronger case for consideration of segment interrelationships * * * than is present in this abandonment proceeding" (Pet. App. 5a). The court further determined that even if consideration of possible interrelationships was required, the requirement was met because (1) the ALJ's finding that the northern and southern segment proceedings were "clearly identifiable and separate" had substantial support in the record; (2) there was no requirement that the Commission reopen the northern segment proceeding just because B&O

[3]B&O's application for authority to abandon the southern segment was subsequently dismissed when the Commission approved acquisition of that segment by another company (Pet. App. 49a-77a). *Prairie Trunk Railway - Acquisition and Operation*, 348 I.C.C. 832. The middle segment proceeding is still pending before the Commission.

ultimately filed an abandonment application on the middle segment in 1975; and (3) the ALJ had before him evidence that most of the traffic over the northern segment (which was light to begin with) did not move over the middle or southern segments (Pet. App. 4a-7a).

ARGUMENT

As noted by the court below, "petitioners do not directly attack the substantive conclusion of the ICC that the public convenience and necessity permit abandonment of the northern segment" (Pet. App. 3a). Their sole contention in this Court is that the Commission "considered the northern segment application in a vacuum" because it failed to make specific findings concerning the impact of the northern segment abandonment on the continued viability of the middle and southern segments (Pet. 4). The extent to which certification or abandonment of particular segments of a rail or trucking line affects service on other segments, however, is a factual matter that varies from case to case. Cf. *American Trucking Associations, Inc.* v. *United States*, *supra*. The court of appeals thoroughly canvassed the record in this case, and there is no reason for this Court further to examine the essentially factual conclusion that there was ample ground for the Commission to decide the application for abandonment of the northern segment independently of the other segments.

As the court of appeals ruled (Pet. App. 5a-7a):

> With reference to the only two abandonment applications pending at the time, covering the northern and southern segments, the same ALJ heard both proceedings and was thoroughly familiar with the comparative considerations underlying both. He concluded that "[e]ach of the proceedings is clearly identifiable and separate," and that "the shippers

and their interest are different." We have reviewed the record, and we surely cannot say that these findings lack substantial support in the evidence. In this regard, we think it is significant that the record shows that the preponderance of northern segment traffic moved east from Sangamon Junction to Indianapolis and did not travel on either the middle or southern segments, and that of more than 2500 cars moving over either the northern or southern segments in 1971, only 14 moved on both segments. We also note that the ALJ found the conditions pertaining to the northern and southern segments to be so different that he recommended granting the former and denying the latter application for abandonment.

* * * In any case, the ALJ had before him evidence that most of the northern segment traffic travelled on east to Indianapolis rather than southeast over the middle and/or southern segments. Because the northern segment traffic was light to begin with, we surely cannot say that the ALJ's later-adopted report inadequately considered appropriate interrelationships.

As shown by the foregoing, the Commission gave appropriate consideration to the relationship of traffic on the northern segment to traffic on the middle and southern segments. Thus, petitioners err in contending (Pet. 8-11), that the Commission is allowing the piecemeal abandonment of rail lines one segment at a time.

Moreover, consolidation of the northern, middle, and southern segment proceedings was neither necessary nor practical. B&O's application for abandonment of the middle segment was not filed until 1975, some two years after the ALJ's reports on the northern and southern segments. The court of appeals correctly noted that it was

not "incumbent on the ALJ to forecast B&O's intentions regarding the middle segment in 1972 and to design his hearing schedule and evidentiary rulings on the basis of the then unfounded assumption that abandonment was in the works" (Pet. App. 6a). After the middle segment application was filed in 1975, the decision whether the other proceedings should be reopened for consolidation was a matter of administrative discretion. In light of the evidence that the segments are economically distinct, the court of appeals correctly concluded that this discretion had not been abused (Pet. 4a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 76-1700

IN THE

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Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF

Petitioners make this reply to the Opposition by the Government ("S.G.") and by The Baltimore and Ohio Railroad Company ("B&O"), in accordance with Rule 24(4).[1]

The Solicitor General does not correctly perceive the question presented by our petition. The question presented is not

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[1] The I.C.C.'s decision is now reported. *Baltimore and Ohio R. Co. Abandonment,* 348 I.C.C. 761 (Nov. 3, 1975).

whether the I.C.C. should have consolidated B&O's three applications to abandon the three segments of its 228-mile line running from Beardstown to Shawneetown, Ill. (S.G. Br., p. 2). Instead, the issue before the court is whether the I.C.C. may authorize the abandonment of the 43.7-mile "northern" segment (Beardstown-Coal Shaft), without evidence and findings concerning the impact of such abandonment upon the continued viability of the other segments. (Pet., p. 2). We urge the Court to determine whether the consideration governing "public convenience and necessity" for a railroad's multiple applications for motor carrier rights, also governs a railroad's multiple abandonment applications for a branch line. Cf. *American Trucking Assns. v. U.S.*, 326 U.S. 77, 85 (1945). The answer is important.[2]

B&O argues that the I.C.C. "affirmed" the ALJ's decision to deny B&O's application to abandon the "southern"

[2] The Government does not dispute the importance of the current "segmentation" approach of the I.C.C. to line abandonments. (S.G. Br., pp. 5-7). Of course, the fact that "most" (not otherwise defined) northern segment traffic also moves on the Indianapolis line does not measure the importance of the northern segment's total traffic and operational value to the middle and southern segments.

segment. (B&O Br., p. 5, fn. 2). This is incorrect, as the I.C.C. would place a weak and untried "short-line" in the stead of B&O, thus allowing B&O to abandon operations, without future obligation (Pet., 49a).

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